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HOWARD'S PRACTICE REPORTS,

CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE AND THE
GENERAL PRACTICE

OF THE

STATE OF NEW YORK,

SELECTED FROM

Decisions of all the Courts,

WITH NOTES,

By R. M. STOVER.

WITH A BRIEF DIGEST OF ALL POINTS OF PRACTICE CONTAINED IN THE
STANDARD NEW YORK REPORTS ISSUED DURING THE
PERIOD COVERED BY THIS VOLUME.

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Penal Code, § 148	417	Penal Code, § 291	845
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SECTIONS OF CODE OF REMEDIAL JUSTICE CITED.

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Code R. J., § 686	407	Code R. J., § 448	408

HOWARD'S PRACTICE REPORTS,

NEW YORK.

NEW SERIES.

SUPREME COURT.

The People *ex rel.* OSCAR J. BROWN agt. THE BOARD OF SUPERVISORS OF THE COUNTY OF ONONDAGA.

Criminal Practice—Code of Criminal Procedure, section 808—There is no provision for pay of assigned counsel by the public—Such services not a county charge.

Where the court assigns counsel to defend a prisoner, the counsel's claim for his services is not a legal charge against the county.

The defense of poor prisoners, upon assignment by the court, is one of the duties contemplated by the lawyer's oath of office, which he impliedly assumes in accepting the privilege of practicing law.

A claim for services rendered by an assigned counsel, is not a charge against the county, because there is no statute directing or authorizing the court to assign counsel to defend prisoners, or providing any compensation or prescribing any mode of payment for such service.

Section 808 of the Code of Criminal Procedure, has not changed the law in this respect.

Onondaga Special Term, December, 1885.

ON the 8d of February, 1885, Oscar J. Brown, the relator, an attorney and counsellor-at-law, was assigned by the court of oyer and terminer, then sitting in Onondaga county, to defend one Antonio Rego, who had been indicted at the same term for the crime of murder in the first degree. The relator began at once to prepare the case for trial, and devoted, substantially, twenty days to that work. Peculiar difficulties attended such preparation, as neither the defendant nor many of the witnesses

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were able to speak or understand the English language. The trial began on the 23d of February, and terminated five days later, in a verdict of murder in the first degree. A motion for a new trial, made before the oyer and terminer February 28th was denied, and the defendant was sentenced to be hanged on the 10th of April. On the 14th of March, an appeal was taken to the general term, and the relator spent from thirty to fifty days in preparing the case and exceptions and his brief for the argument of the appeal. He was compelled to make several journeys from Syracuse, where he resided, to Utica, where the general term was in session, in order to argue said appeal. The appellate court reversed the judgment of conviction, and ordered a new trial. Twenty-two days were employed by the relator in preparing for the second trial, which lasted eleven days, and resulted on the 25th of June, 1885, in a verdict of murder in the second degree.

Subsequently the relator presented to the board of supervisors a claim amounting to \$1,000 for his services, in defending said Antonio Rego upon said indictment. The board refused to audit or allow any part of such claim, upon the ground that it had no authority so to do, and thereupon the relator, upon proof of the foregoing facts, procured an alternative mandamus, requiring the supervisors to audit his bill, or show cause to the contrary before this special term.

To such writ the defendants demur, upon the ground that facts sufficient to constitute a cause of action are not stated, either in the writ or in the affidavit, upon which it was granted.

Oscar J. Brown, relator, in person.

Hine & Stephens and *Louis Marshall*, for defendants.

VANN, J.—The services rendered by the relator were of much value, not only to the prisoner in whose behalf they were performed, but also to the public generally, who have the same interest in the acquittal of the innocent as in the conviction of the guilty. Services of the same character, however, have been

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rendered to the poor and unfortunate by nearly every lawyer of experience, as ably and conscientiously, without hope of pecuniary reward, as though upon the most liberal retainer. The defense of poor prisoners, upon assignment by the court, is one of the duties contemplated by the lawyer's oath of office, which he impliedly assumes in accepting the privilege of practicing law (1 *R. S.*, 367-8 [7th ed.]). Although at an early day in England the right of defending by counsel was denied even to a person on trial for the most serious crime, that harsh rule was gradually relaxed until the prisoner became entitled to counsel, not only when he was able to employ one, but even when he was not. While the territory now embraced by the state of New York was a colony of Great Britain it was a part of the common law that counsel should be assigned by the court for the defense of poor persons charged with crime (4 *Black. Com.*, 355; 1 *Chitty Cr. Law*, 407, 413). Upon the organization of our State, the common law, with certain exceptions not material to be now considered, was, by the constitution then adopted, made a part of the law of the land (*Cons. State of N. Y.*, art. 1, sec. 17). During our entire history, both as a colony and as a State, it has been the duty of an attorney assigned to defend a poor prisoner to obey the order of the court (*The People re Saunders agt. Supervisors of Erie County*, 1 *Sheldon*, 517). He is an officer, not of the state or county, but of the court, subject to its direction and discipline, and bound by his oath to obey its orders. He derives his authority to practice from the courts, and is subject in many ways to their summary jurisdiction, including the right of assignment upon criminal trials, and under certain circumstances even in civil cases also. As early as 1494 a statute was passed by the English parliament "in behalf of the poor persons of this land not able to sue for their remedy after the course of the common law," and providing "that such poor persons shall have writs, &c., &c., therefor paying nothing," and that "the justices shall assign to the same poor person counsel learned, by their discretions, which shall give their counsel, nothing taking for the

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same" (2 *Hen. vii., chap. 12*). Even this early statute only confirmed the common law (*Brunt agt. Wardle*, 8 *Mann. & Granger*, 584). Similar provisions exist in our statutes which enable a person who has a cause of action against another, but is not worth one hundred dollars, besides the wearing apparel and furniture necessary for himself and family and the subject of the action, to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his suit, "who must act therein without compensation" (*Code Civ. Pro., secs. 458 to 462*; 2 *R. S.*, 444).

A defendant in an action involving his right to real or personal property may, under like circumstances, have the same privilege (*Code Civ. Pro., sec. 463 to 467*). A person so situated may prosecute or defend without paying fees to any officer (*Id.*, *sec. 461*).

Although for time out of mind it has been the right and duty of courts to assign counsel for the defense of destitute persons under indictment, and likewise the duty of counsel to obey the order of the court, there are but few reported cases upon the subject of enforcing payment from the public for services rendered under such circumstances, and no case in this state where the attempt to compel payment was successful. The earliest effort in that direction that appears in our reports was the case of *The People ex rel. Hadley agt. The Supervisors of Albany County* (28 *How.*, 22), decided in 1864. The relator in that case was assigned to defend a woman indicted for murder. He asked to be excused, but the court declined to release him. He thereupon engaged in the defense of the accused person, and conducted it through different courts for three years until she was finally acquitted. The supervisors having rejected his claim for compensation, he applied for a mandamus to compel them to audit it. It was held that the claim was not chargeable against the county, because there was no statute directing or authorizing the court to assign counsel to defend prisoners, or providing any compensation or prescribing any mode of payment for such service. This case was expressly approved by

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the court of appeals in *The People ex rel. Ransom agt. The Supervisors of Niagara County* (78 N. Y., 622), where the relator, who had been assigned to defend a prisoner indicted for murder, sought to compel payment of his claim for services and disbursements, after the oyer and terminer had ordered that his compensation should be a charge against the county. The court, all of the judges concurring, adopted the opinion in the Hadley case, saying that it "contains a sound exposition of the law upon the subject."

The only other case cited from our own reports was *The People ex rel. Saunders agt. The Supervisors of Erie Co.* (1 Seld., 517), where it was held that such claims for compensation could not be enforced in the absence of express authority from the legislature.

The rule in other states is not uniform. The following cases hold that attorneys appointed by the court, pursuant to the command of a statute to defend persons charged with crime, and unable to employ counsel, are not entitled to compensation (*Arkansas Co. agt. Freeman*, 31 Ark., 266; *Nobb agt. The United States*, 1 Ct. of Claims, 173; *Case agt. Commissioners of Shawnee Co.*, 4 Kan., 511; *Johnson agt. Lewis and Clarke Co.*, 2 Montana, 150; *Kelly agt. Andrew Co.*, 43 Mo., 338).

The following cases hold the same, the assignment being so far as appears in the absence of statutory authority (*Rowe agt. Yuba Co.*, 17 Cal. 61; *La Mont agt. Solano Co.*, 49 id., 158; *Elam agt. Johnson*, 48 Geo., 348; *Vise agt. County of Hamilton*, 19 Ill., 78; *Wright agt. The State*, 3 Heisk. [Tenn.], 256; *Bacon agt. County of Wayne*, 1 Mich., 441).

The contrary rule is held in the following cases (*Blythe agt. The State*, 4 Ind., 525; *Webb agt. Baird*, 6 id., 13; *Hall agt. Washington Co.*, 2 Iowa, 473; *Carpenter agt. County of Dane*, 9 Wis., 274; *County of Dane agt. Smith*, 13 id., 585).

No case bearing upon the question has been cited that arose in this state, except the three above mentioned.

It is evident, therefore, that the relator cannot succeed on this demurrer, unless, since these cases were decided, the legislature

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has, by some statute, made claims of the kind under consideration chargeable against the county. He insists that section 308 of the Code of Criminal Procedure, which took effect on the 1st day of September, 1881, has this effect. That section provides, that "if the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and, if he does, the court must assign counsel." The object of the Code of Criminal Procedure was not to change but to codify the practice already existing. Prior to its passage the most of its provisions were already a part of the written or unwritten law of the state, but were widely scattered in different statutes and decisions of the courts. The legislature, in enacting this Code, did little more than reduce to a compact, convenient and definite form, the criminal practice actually existing at the time. In a few instances the practice was simplified, and some doubtful questions were settled; but the main result, intended and effected, was simply the codification of the law governing criminal procedure. The second section quoted does no more than declare the unwritten law in force when the Code was adopted, inherited with the great body of the common law, and confirmed by the uniform practice of all our criminal courts of record, both colonial and state. The duty of the court to assign counsel and of counsel to act upon the assignment, was not more binding after the legislative enactment than it was before. The common law upon the subject was simply written out and enacted in a statute, at least in part, for the section in question only provides for the assignment of counsel if the defendant appear for arraignment without counsel, but is silent as to the duty of the court if he appear for trial without counsel.

If the legislature had intended that assigned counsel should be paid for their services by the public, it is to be presumed that they would have so provided in definite and certain language. They knew that the highest court had decided that such services were not a county charge, and if they designed to change the law in that respect, would they not have said something upon the subject? would they have left it wholly to argu-

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ment or inference? can it fairly be held that when they were passing an act merely declaratory of the common law relating to criminal practice, they intended to make such a change, in the absence of an express provision to that effect? especially can it be so held when no new duty was imposed upon either court or counsel?

The learned relator insists that, as no one should be compelled to render gratuitous service to the public, necessarily the legislature intended that he and those similarly situated should be paid. But the argument *ex necessitate* is not wholly on one side.

The increase of expenses, the lengthening of trials and the danger of abuses of various kinds that will occur to every thoughtful lawyer, are subjects worthy of consideration. The valuable privilege that every attorney enjoys of exemption from jury duty, is worth more to the legal profession in time and money than liberal compensation for the defense of poor prisoners. The readiness of attorneys to assume the burden of aiding the destitute and friendless, the reluctance of courts to insist that counsel should act when it would be a hardship, the smoothness with which the practice has worked for generations, the absence of any strong or general pressure from the profession for compensation, and the virtual assent of the ablest and noblest men of the bar for so many years to the existing state of affairs, are facts within the knowledge of, and doubtless considered by, the legislature, and, in the light of which the section in question may be construed (*Sedgwick on Stat. & Con. Law*, 190, 231), "the reason of the law, the motive which led to the making of it, and the object in contemplation at the time, is the most certain clue to lead us to the discovery of its true meaning" (*Vattel's Rules of Interpretation*, Liv. 2, sec. 270).

My conclusion is, that the claim of the relator is not chargeable against the county, and that the supervisors have no power to order it paid. He discharged his duty faithfully, and, in so doing, served both the prisoner and the public. He is entitled to the thanks of the court and the community, but his claim for

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compensation, however equitable, cannot, in my judgment, be paid until further action is taken by the legislature.

The demurrer is sustained.

NOTE.—Attention is called to foot-note of reporter on page 23 of Howard's Practice Reports, volume 28, as being an appropriate reminder to the legislature of the propriety and justice of passing a law to compensate counsel for such services.—[Ed.]

SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM MURRAY *et al.* agt. JOHN
McCLAVE.

New York (city of)—Police relief fund—Constitutional law—Laws of 1885, chapter 486, establishing a life insurance fund for police department is constitutional—Duty of treasurer of board of police commissioners to deduct two dollars from the salary of each policeman.

The general intent of the act (*chapter 486, Laws of 1885*) was to establish a life insurance fund for the police department and, so far as this act relates to members of the police force, it is the duty of the treasurer of the board of police commissioners to deduct a sum equal to two dollars per month from the salary of each member of the police force, whether such deduction be assented to or not.

Such deduction may be made in the case of each member or employee of the department, other than the said force, who shall desire to avail himself of the privileges and provisions of the act, and also in the case of members of the Police Mutual Aid Association, who are in good standing and who shall desire to contribute to the said fund.

Held, also, that the act in question is not unconstitutional, as depriving the members of the police force of their property without due process of law, nor as being a local act and decreasing the allowance of a public officer during the term for which he was appointed.

New York, Chambers, December, 1885.

Francis C. Barlow and Stickney & Shepard, for the relators;
M. Shepard and Charles W. Wetmore, of counsel.

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E. Henry Lacombe, counsel for the corporation, for the respondent; *David J. Dean*, of counsel.

LAWRENCE, *J.*—This is an order to show cause why a pre-emptory mandamus should not issue against John McClave, treasurer of the board of police of the city of New York, requiring him to deduct for the month of September, 1885, and for every succeeding month, two dollars from each monthly pay otherwise due or payable by him as treasurer to sergeant Alexander B. Wartz and patrolmen Francis Caddell and James Currie, as sergeant and patrolmen, and also from the monthly pay otherwise due or payable by him as treasurer aforesaid to each and every member of the police force of the police department of the city of New York, as such; and also and separately why a peremptory mandamus should not issue against the said John McClave, treasurer as aforesaid, separately, requiring him to pay George W. Dilks, treasurer of the board of trustees of the police fund of the city of New York, all moneys in the hands of said John McClave, as such treasurer, which have been during the time and since the passage of said act, and until the 10th of September, 1885, deducted by him, acting under the provisions of the act, chapter 486 of the Laws of 1885, from the pay of the members of the police force of the city of New York.

The order to show cause was issued upon the affidavit of William Murray, the superintendent of police of the city of New York, which set forth that Thomas Byrnes, Henry V. Steers and George W. Dilks are the inspectors, and the only inspectors, of the police department of the city of New York, said city having, according to the last census, a population exceeding one million; that the three said inspectors and said Murray, as superintendent aforesaid, compose the board of trustees of the police relief fund of the city of New York; that said board has been duly organized by choosing from their number William Murray, the deponent, as chairman and George W. Dilks as treasurer, and by appointing sergeant Washington Mulien as secretary. It is then set forth that the respondent, John McClave,

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is the treasurer of the board of police; that, acting under the authority of chapter 486 of the Laws of 1885, said McClave, as treasurer of the board of police, has since the passage of the act and until the 30th of September, 1885, deducted from the pay of the members of the police force, two dollars per month for each member of the police force and also for each member or employee of the department of police in the city of New York, other than the said police force, who has desired to avail himself of the privileges and provisions of said act.

The sum thus received by said McClave is alleged to have amounted on the 1st of September to \$17,636. It is also alleged that demand has been made upon McClave as such treasurer to pay the same to the treasurer of their said board of trustees of the police relief fund, but he has refused so to do. It is also alleged that McClave has refused to deduct, pursuant to the provisions of said act, the sum of two dollars in each case from the pay, otherwise due and payable by him as such treasurer for the month of September to one Alexander B. Wartz, a police sergeant and a member of the police force, and to one Francis Caddell and to one James Currie, who are patrolmen and members of the said force; the said Wartz, Caddell and Currie having refused the said deductions to be made from their pay; and that the said McClave has refused and now refuses to make such deductions, and has notified the deponent and the said inspectors, his associates or others forming the board of trustees of the police relief fund, &c., that he declines, and will decline to make such deductions of two dollars from the monthly pay otherwise due, &c., to members of said police force who shall or may object to such deduction being made.

Certain correspondence which has passed between the said McClave as such treasurer and the trustees of the police relief fund is appended to the affidavit of superintendent Murray. No affidavits were read on the part of the respondent, but an opinion of the counsel to the corporation, bearing date July 2, 1885, was submitted, in which the learned counsel arrives at the conclusion that the law does not compel the board of police

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commissioners to deduct two dollars per month from the salary of each member of the police force; but that the act does, however, authorize two dollars a month to be deducted from the pay of such members of the police force as desire to avail themselves of the privileges of the act, and also from the pay of such members or employees of the department other than the said police force, who desire to avail themselves of the privileges of said act. On the argument, the application for a mandamus to compel Mr. McClave to pay over the said sum of \$17,186, referred to in superintendent Murray's affidavit, was abandoned for the present, and the sole and only question which was discussed was whether, as to members of the police force, of the police department, the deduction of two dollars a month under the act aforesaid can be made without their consent.

By chapter 486 of the Laws of 1885, entitled "An act to create a relief fund in the police department in all cities of this state having, according to the last census, a population exceeding one million," it is provided that "the superintendent of police and the inspectors of police of the police department in all cities of this state having, according to the last census, a population exceeding one million, and their successors in office, are hereby constituted a board of trustees of the police relief fund created by this act."

After providing for the organization of such board, it is provided that the board of trustees "shall have charge of and administer said fund, and from time to time invest the same, or any part thereof, as they shall deem most beneficial to said fund, and are empowered to make all necessary contracts and take all necessary and proper actions and proceedings in the premises and to make payments therefrom in pursuance of this act."

Said trustees are also to establish rules and regulations for the administration of the police relief fund, and are to report annually to the board of police, &c., the condition of the same.

Section 2 provides that "the police relief fund shall consist of a sum of money equal to two dollars per month for each member of the police force of said department, and also for each member

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or employee of said department other than the said police force, who shall desire to avail himself of the privileges and provisions of this act, and also for members of the Police Mutual Aid Association of the said department, who, at the time of the passage of this act, are in good standing therein and who shall desire to contribute to the said fund, to be paid monthly by the treasurer of the board of police or commissioner of police of said department to the treasurer of the board of trustees of the police relief fund created by this act, from moneys deducted from the pay of such members of said force or members or employees of said department, and the treasurer of the board of police or commissioner of police of said department is hereby authorized and directed to make such deduction from the pay of the members of said police force as herein provided."

By the third section of the act "members of the said police force, and members or employees of said department other than the said police force, who may hereafter resign or be dismissed or retired therefrom, and members of the said Police Mutual Aid Association, who are in good standing at the time of the passage of this act, may avail themselves of the privileges and provisions thereof by making a monthly payment of the sum of two dollars to the treasurer of said relief fund; but any such person not in the employ of the said police department, or a member thereof, who shall fail to pay the said sum of two dollars within thirty days after the same shall have become due, shall forfeit all claim to any portion of said fund or benefit to be derived therefrom."

The fourth section of the act provides that "upon the death of any member of the police force of the said department or member or employee thereof, other than the said police force, contributing to the said fund, &c., there shall be paid by the trustees of the said fund to the person or persons designated, in writing, by such member, employee or person contributing thereto, or if no person or persons have been so designated, then to the widow, or if there be no widow, then to the legal representatives of such deceased member, employee or person, the

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sum of \$1,200 out of the moneys so deducted, withheld or contributed."

It is contended by the relators that the general intent of the act was to establish a life insurance fund for the police department, and that so far as the act relates to members of the police force, it is the duty of the respondent to make the deduction of two dollars per month from their pay, whether such deduction be assented to or not. From my examination of the statute I am of the opinion that the relator's position in this respect is sound. It seems to me that the true construction of section 2 is that the treasurer of the board of police commissioners must deduct a sum equal to two dollars per month from the salary of each member of the police force, and that such deduction may be made in the case of each member or employee of the said department, other than the said force, who shall desire to avail himself of the privileges and provisions of the act, and also in the case of members of the Police Mutual Aid Association, who are in good standing, and who shall desire to contribute to the said fund.

I also think that the relator's counsel is right in contending that the words "*who shall desire to avail himself*" and "*who shall desire to contribute to said fund*" are limited to members or employees of the department and members of the Police Mutual Aid Association *who are not members of the police force*. That the legislature intended to make a distinction between a voluntary contribution and a compulsory deduction is, I think, apparent from the provisions of section 4, in which, in describing the amount to be paid in cases of death, it is directed that the sum of \$1,200 shall be paid out of the moneys so deducted, withheld or contributed. There is a clear distinction here between a contribution and a deduction or withholding. The contribution in my opinion refers to the voluntary payment to be made by those attached to the department or the Police Mutual Aid Association, who are not members of the active police force, and not to the deduction of the sum which "the treasurer of the board of police is authorized and directed to

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make from the pay of the members of the said police force as herein provided." I do not deem it necessary to go minutely into the verbal construction of section 2, nor to consider whether if a comma had not been inserted between the word "force" and the words "who shall desire, &c.," the intention of the legislature to discriminate between a compulsory deduction from the pay of a member of the force, and a voluntary contribution from the other persons attached to the department therein referred to, would have been more clear.

In construing this act we must take into consideration its whole frame work and all of its language. If the intention of the legislature was to provide for a mere voluntary life insurance fund, by the members and employees of the police department, it would hardly have seemed necessary to pass the act at all, as the members of the force and the other employees could have formed such a fund by their own voluntary agreement. It can readily be seen that public policy would dictate that the active members of the force, who are exposed to accident and danger in the performance of their duties, would need protection for their families in case of accident to them; and this seems to me to be a good reason, and one that, it is apparent from the language of the act, impressed itself upon the legislature, for making a distinction between the active members of the force and the other employees of the department. Public policy dictated that, as to the former, a certain fund to provide for their families in case of their death should be created, and that in the case of the latter it should be provided, if the employees so desired and were willing to make the contribution permitted by the act. But it is said that the act in question is unconstitutional if the construction is given to it, to which I have adverted, because it deprives the members of the police force of their property without due process of law, and also because the act is a local act, and that it decreases the allowance of a public officer during the term for which he was appointed. I cannot concur in the validity of these objections.

It was long ago held in the case of *Conner agt. Mayor, &c.*,

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of *N. Y.* (1 *Selden*, p. 285), that the prospective salary or emoluments of a public office are not the property of the officer, nor the property of the state; that they are not property at all; that they are like daily wages unearned and which may never be earned; that the right to the compensation grows out of the rendition of the services, and not out of any contract between the government and the officer, that the services shall be rendered by him (See *opinion of RUGGLES, J.*, at page 296, and *opinion of FOOT, J.*, pp. 299 and 300). The authority of that case has not, I believe, been questioned, but, on the contrary, it has been approved and followed by the court of appeals in many other cases.

In *Smith agt. The Mayor* (37 *N. Y.*, p. 518), HUNT, *Ch. J.*, in delivering the opinion of the court, said: "An office in this country is not property, nor are the prospective fees of an office the property of the incumbent," and, after citing *Conner agt. Mayor* (1 *Selden*, 285), he continues: "The incumbent cannot sell his office or purchase it, or encumber it. It will not pass by an assignment of all his property, nor will such assignment affect his right to prospective fees. * * * The legislature may diminish or abolish the fees at pleasure, or may render it a salaried office."

The corporation of the city of New York may do the same when it fixes the rate of compensation. It is only in the cases of a few of the state offices that the constitution prohibits such interference" (See also *The People agt. Stevens*, 51 *How. Pr. Rep.*, 153; *People agt. Roper*, 35 *N. Y.*, p. 639; *People agt. Devlin*, 33 *N. Y.*, p. 288).

It is claimed that the decision of the court of appeals in the case of *The People ex rel. Ryan agt. French* (91 *N. Y.*, 265) sustains the view of the respondent's counsel. I do not think so. DANFORTH, *J.*, in delivering the opinion of the court in that case, says: "The cases (*Conner agt. The Mayor*, 5 *N. Y.*, 285; *Smith agt. The Mayor*, *id.*, 518; *Dolan agt. The Mayor*, 68 *id.*, 274, and *McVeany agt. The Mayor*, 80 *id.*, 185) cited by the respondents have no application to the question before

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us. None of them decides that an incumbent of a public office entitled to an annual salary can be deprived of any part of it by an authority which did not fix the salary, and which is prohibited from doing so, or that any part of it can be withheld from him by reason of his involuntary disability to perform the duties of such office." In the case of *Ryan*, it was not decided that the legislature, which fixed the salary of the members of the police court, could not change or reduce that salary during his continuance in office. The point there was, whether the board of police could, by a mere rule, prescribe that members of the force should receive one-half or one-fourth pay for lost time during illness, the salary of the police having been fixed by the legislature, and it was held that the rule of the board was invalid.

It will be observed in examining the opinion of the court of appeals in the *Ryan Case*, that the cases of Conner, Smith and other, above referred to, are not overruled, and that it is nowhere held that the legislature cannot alter or decrease the salary of a public officer which they themselves have fixed, there being no express provision in the constitution against the diminution of such salary. It is said, however, secondly, that the act is a local act, and decreases the allowance of a public officer during the term for which he was appointed, and that it is, therefore, in conflict with section 18, article 3 of the constitution. That section was the subject of examination in the case of *Mangam agt. The City of Brooklyn* (98 N. Y., 595), in which it was held that it did not apply to officers receiving fixed salaries, but included only those irregular and uncertain modes of compensating public servants indicated by words of like meaning with fees, percentage, &c.

RUGER, *Ch. J.*, in delivering the opinion of the court in that case, says: "In a proper sense there are no public officers in the state whose compensation may not be increased or diminished by the legislature during their terms of office, except those of governor or lieutenant-governor, the other state officers named in the constitution, judges of the court of appeals, judges of the

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supreme court, county judges and surrogates. These are, by the terms of the constitution, expressly exempted from the power of the legislature to diminish, and, in some cases, to increase during their existing terms. * * * All other public officers are subject to the power of the legislature, to increase or diminish their compensation at any time, provided it be done by a general law. In a strict sense, therefore, the language of this section does not apply to the officers in question; for the inhibition is against such legislation by local or private bills only, and not to enactments accomplishing these objects by general law."

The learned judge then goes on in an elaborate opinion to hold that the provisions of the article of the constitution in question do not apply to officers receiving fixed salaries. In that very case the question arose between a policeman or the administratrix of a policeman and the city of Brooklyn. The action was brought for a balance of salary claimed to be due to the intestate, and it was alleged that as the compensation of the patrolman, at the time the intestate joined the police force, was \$1,100 per annum, the common council of Brooklyn had no power under a local act, which conferred such authority upon them, to reduce the annual compensation payable to patrolmen from \$1,100 to \$1,000 per annum. This case seems to be conclusive as to the second point raised by the counsel to the corporation in respect to the constitutionality of chapter 486 of the Laws of 1885. Nor do I think that this proceeding should be dismissed on the ground that it appears that the three members of the police force, named in the moving papers, who have refused to submit to a monthly deduction from their salaries, are not made parties to it.

The object of this proceeding is to compel the respondent, McClave, to perform a duty imposed upon him by the act of 1885. Of course, the rights of the three objecting members of the force cannot be definitely disposed of; but the duty of the treasurer of the police department can be enforced without

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their presence. Besides, under the order to show cause, it is asked that the respondent not only make the monthly deductions from the salaries of the three members of the force named therein, but also from the monthly pay otherwise due or payable by him, as treasurer aforesaid, to each and every member of the police force of the police department of the city of New York as such.

Inasmuch as it does not appear that any other members of the police force than those named in the order to show cause have objected to such deductions, the relators are, in my opinion, under the construction which I have given to the act of 1885, entitled to a peremptory mandamus, directing the respondent to make such deductions.

Let an order be entered herein on two days' notice.

CITY COURT OF NEW YORK.

RUDOLPH E. KRAFFT, plaintiff and appellant, agt. H. JOSEPHINE WILSON, impleaded, &c., defendant and respondent.

Costs—Rule as to two or more defendants—Code of Civil Procedure, section 8229.

Where in an action against two or more defendants the plaintiff is entitled to costs against one or more, but not against all of them none of the defendants are entitled to costs as of course.

The provision of section 8229 of the Code of Civil Procedure, that costs may be awarded in such case to a successful defendant in the discretion of the court, applies only where such successful defendant is not united in interest with those unsuccessful, and when he interposes a separate defense by a separate answer. The fact of not being united in interest standing alone is not sufficient; both circumstances must exist before costs can be awarded.

General Term, December, 1885.

APPEAL from an order denying a motion made by the plaintiff to set aside the taxation of costs in favor of the defendant.

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D. A. Spellissy, for appellant.

James C. Quinn, for respondent.

MCADAM, *C. J.*—The action was commenced upon a bank check drawn by "Robert Wilson, trustee," one of the defendants. The co-defendant, H. Josephine Wilson, was made a party on the allegation that Robert Wilson was her trustee, and that in making the check he acted on her behalf and for her benefit. It was neither in law nor in fact the joint check of both defendants, but the individual obligation of Robert Wilson, the term "trustee" being merely *descriptio personæ*, the *cestui que trust* not being in any manner liable upon it.

Upon the trial the plaintiff recovered a verdict against Robert Wilson individually, but as to H. Josephine Wilson the *cestui que trust*, the complaint was dismissed, "with costs." The plaintiff entered judgment on the verdict against Robert Wilson, "with costs," and the defendant, H. Josephine Wilson, had her costs taxed by the clerk, and from an order denying a motion to set aside the taxation the present appeal is taken. The question to be considered on this appeal is as to the power of the trial judge to allow costs to the defendant, who was successful at the trial, because if the court had no discretionary power in the premises the award of costs and the taxation which followed were all without authority, and the application to set aside the taxation ought to have been granted. By the common law costs were not awardable and were recoverable only by action (*Downing agt. Marshall*, 37 N. Y., 380). The power to award costs emanates from the statute, and authority for awarding them must be found in the Code, or they cannot be awarded.

The rule that where the plaintiff does not succeed as to costs they go, as, of course, to the defendant, has its exceptions, one of which will be found in section 3229 of the Code, which, among other things, provides that in "an action against two or more defendants, wherein the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants

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are entitled to costs, of course. In that case costs may be awarded, in the discretion of the court, to any defendant against whom the plaintiff is not entitled to costs, where he did not unite in an answer and was not united in interest with a defendant against whom the plaintiff is entitled to costs."

The defendant, H. Josephine Wilson, was not united in interest with Robert Wilson, and is entitled to costs, unless the circumstance that she united with her co-defendant in an answer to the complaint, instead of interposing a separate answer thereto, prevents the court from making the discretionary award of costs contemplated by the section cited. Section 3229 (*supra*) is taken from sections 305 and 306 of the former Code of Procedure, which contained similar language. These sections were considered by the court of appeals in *Allis agt. Wheeler* (56 N. Y., 50), which held that the right to costs in such cases as the present was confined to those expressly mentioned in the section, i. e., where the successful defendant is not united in interest with those against whom the plaintiff recovers, and where they make separate defenses by separate answers. That the fact of not being united in interest standing alone is not sufficient; a separate defense by a separate answer must have been interposed as well, as both of these circumstances must exist before the costs can be awarded.

To the same effect in *Park agt. Spaulding* (10 Hun, 128), and the codifiers say that they intended section 3229 (*supra*), as adopted by the legislature, to be in accordance with the law as laid down in *Allis agt. Wheeler* (*supra*), and they have, in our judgment, given legal effect to their intention. It follows from this interpretation of section 3229 (*supra*) that the defendant, H. Josephine Wilson, though successful in her defense, is not entitled to costs, on the sole ground that she failed to interpose a separate answer, that the court had no power to award her costs and that the subsequent taxation thereof was unauthorized and should have been set aside upon the motion made for that purpose.

The order appealed from must, therefore, be reversed, but as

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the question of interpretation under the present Code is apparently new, the reversal will be without costs (*Code, sec. 8229*).

SURROGATE'S COURT.

In the Matter of DERICKSON Minors.

Guardian—Authority of the surrogate to allow access to the infant—Code of Civil Procedure, section 2821.

Upon an application for an appointment of a guardian of an infant, the surrogate has authority to direct that access to the infant shall be allowed by the guardian when appointed, to such persons as the Surrogate may designate.

New York county, January, 1886.

ROLLINS, S.—The grandmother of these infants, with whom they are now residing, has applied to be appointed their guardian. Their father is dead. Their mother is not herself an applicant for letters of guardianship, but opposes the appointment of the grandmother, except upon the condition that she herself shall be afforded an opportunity from time to time of visiting her children. To this restriction the petitioner refuses her assent, and she disputes the authority of the surrogate to impose any such condition upon the issuance of letters.

The power of the court of chancery to award the custody of an infant to one person and to allow access to another under such limitations as it chose to impose, has been often asserted (*Macpherson on Infants*, 120-1; *Ex parte Ralston*, 1 R. M. Charl., 119). "The court," says Schouler (*Dom. Rel., sec. 332*), "will judge as to what the interests of the child require, according to the circumstances of each case, and will make orders accordingly, both as to the actual custody and as to the persons who may have access to the child."

The authority conferred upon surrogates by section 2821 of

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the Code of Civil Procedure is in this regard as extensive as that which was formerly exercisable by the chancellor.

I am clear that in a proper case I may give direction as to access.

The petitioner's counsel claims that such direction should not here be given, because of the alleged depraved character of the children's mother.

This presents an issue of fact which must go to a reference. While such reference is pending, the children may remain in charge of their grandmother.

SUPREME COURT.

DANIEL L. COUCH, as assignee, &c., agt. GEORGE M. MILLARD *et al.*

Costs—In equity action—In the discretion of referee—Special term no power to overturn his conclusions—Code of Civil Procedure, sections 8238-3253—Additional allowance—When should be made—Rules applicable to.

In an action brought by an assignee to set aside a chattel mortgage given by a judgment debtor to defendants as security for \$28,000 of acceptances made by defendants for the mortgagors—said chattel mortgage covering a large quantity of lumber, machinery, &c.; the assignee seeking to compel defendants to account to him for the property taken by them under said mortgage, a reference being had, the costs of the action are in the discretion of the referee, and after the exercise of such discretion it is not within the province or power of the special term to overhaul and overturn his conclusions.

His decision as to costs cannot be disturbed except by an appellate court having power to review the case upon its merits.

Where an assignee assaulted a security held by defendants to indemnify them against accommodation liabilities, assumed for the assignors and sought to strike it down as fraudulent and void, and failed in the principal purpose of his bill and was charged with costs payable "first out of the fund;" on motion for an extra allowance on the part of defendants, on the ground that the case was difficult and extraordinary:

Held, that the principles stated in *Burke agt. Candee* (63 Barb., 552) are applicable to this case and that an extra allowance should be made.

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Held, further, that as the principal subject matter of the litigation was the chattel mortgage of \$26,000, and that having been sustained by the referee, upon that it is proper to make the allowance.

Held, also, that three per cent. on the \$26,000 is a suitable sum to compensate the parties for the expenditures of skill, labor and professional ability required by the protracted trial.

Oneida Special Term, December, 1885.

MOTION for an extra allowance on the part of defendants, on the ground that the case was both difficult and extraordinary.

It was brought to set aside a chattel mortgage given by Millard, Underwood & Co., to the defendants, on the 1st of December, 1875, as a security for \$26,000 of acceptances made by defendants for the mortgagors; the chattel mortgage covered a large quantity of lumber and machinery and other property, and plaintiff sought to compel defendants to account to the plaintiff as assignee for the property taken by them under said mortgage. After issue joined, a reference was had to W. G. Robinson, esq., who heard the case in Oswego, Poughkeepsie and New York cities, and spent some twenty days in hearing and 210 days in deciding the case, as he certifies; he certifies that the case was both difficult and extraordinary. The referee held the chattel mortgage a valid security in the hands of defendant, and took an account of the property covered by the mortgage and taken by defendants, and found due from defendants \$6,808.97—surplus remaining in the hands of defendants.

Plaintiff's brief contained about "fifty pages closely written matter and his proposed findings of fact and law about twenty-eight pages, closely written pages, of legal cap."

Plaintiff asked the referee to find the mortgage fraudulent as against creditors and to order it cancelled and set aside, and defendants required to pay plaintiff \$30,489.70 and interests and costs, and that sales made by defendants are illegal and void. The referee refused such requests. Plaintiff, in his argument before the referee, demanded costs.

Defendants used an elaborate brief before the referee bristling

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with citations or authorities and cases, and covering twenty-four pages, devoted to the legal questions in respect to the validity of the mortgage, and some four pages as to the accounting.

The referee sustained the validity of the chattel mortgage and dismissed the complaint, so far as it "demands that said chattel mortgage be cancelled and set aside as fraudulent and void," and ordered judgment against the defendants "as upon an accounting for said sum of \$6,808.97, with costs and disbursements in the action, both of *said plaintiff and said defendants* to be chargeable to and *to be first* paid out of the said fund, that may come to the said plaintiff in his representative or trust capacity by virtue of any judgment in this action."

Judgment has not been entered. It was conceded on the argument, that the case was difficult and extraordinary. The papers used fully show such a case. The total debit side of the account of lumber and property, as appears by the report of the referee, is \$41,396.31; credit side, \$36,891.96.

W. N. Poucher & D. W. Gurnsey, for motion.

George W. Parkhurst, opposed.

HARDIN, J.—Costs of this action were in the discretion of the referee, and he has passed directly upon the question as one within his discretion (*Code of Civ. Pro.*, sec. 8280; *Chipman* agt. *Montgomery*, 63 *N. Y.*, 221; *Gomley* agt. *Campbell*, 66 *id.*, 169; *Lawrence* agt. *Lindsay*, 68 *id.*, 108; *Blank* agt. *O'Brien*, 23 *Hun*, 82).

After the exercise of such discretion by the referee, it is not within the province or power of the special term to overhaul and overturn the conclusion of the referee (*Stevens* agt. *Verian*, 2 *Lans.*, 90; *Woodford* agt. *Bucklin*, 14 *Hun*, 444; opinion of HARDIN, J., and cases cited therein; *McLean* agt. *Stewart*, 14 *Hun*, 476; opinion HARDIN, J., and cases cited therein).

Whether this case fell within the case of *Ten Eyck* agt. *Holmes* (3 *Sand. Ch.*, 428) and other kindred cases or not, was a question for the referee to consider and decide, and his conclusion

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must be accepted until disturbed by an appellate court having power to review the case upon its merits, and the decision of the referee in regard to costs (*Woodford agt. Bucklin [supra]*).

In *Burke agt. Candee* (63 Barb.), I had occasion to state the rules applicable to applications for an extra allowance in difficult and extraordinary cases, and notwithstanding the adoption of the Code of Civil Procedure since that decision, the general principles then laid down remain. That case has been approved, cited and followed several times (21 *Week. Dig.*, 47; 81 *Hun*, 403; 48 *How.*, 413).

Adopting the principles there laid down, nought remains in this case to be done, except to make an application of them to the case in hand.

It is very apparent that this case was both difficult and extraordinary, and required care, skill, ability and patient industry to be bestowed in its trial before the referee, and in presenting properly the law and facts in arguments to the learned referee.

The proofs are very clear that much professional time and skill were bestowed upon the case. Therefore, an allowance suitable and commensurate with the skill and service bestowed should be allowed, in order to meet the provisions of law in that regard. It is very properly suggested by the learned counsel for the plaintiff that such applications are addressed to the discretion of the court. Indeed, that was held in *Hurd agt. Farmers' Loan Co.* (16 *Week. Dig.*), and in the exercise of discretion the court said a proper case therein had not been made for an allowance.

Here, an assignee assaulted a security held by defendants to indemnify them against accommodation liabilities assumed for the assignors, and sought to strike it down as fraudulent and void. He failed in the principle purpose of his bill, and within cases not unfamiliar, he has been charged with costs payable "first out of the fund."

No good reason is furnished for withholding the application of the principles stated in *Bank agt. Sand* (*supra*). The principle

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subject matter of the litigation here was the chattle mortgage of \$26,000. That has been sustained by the referee. Upon that mortgage it is proper to make the allowance. It is not easy to say just what sum shall compensate the parties for the expenditures of skill, labor and professional ability required by the protracted trial. But upon the proofs before the court, together with the concessions made upon the argument, the conclusion is reached that three per cent. on \$26,000 will be suitable.

An order to that effect may be served and, if the form is agreed to, entered in Oswego, if not assented to in form it may be settled before me on two days' notice, after service of a copy of this opinion.

CITY COURT OF BROOKLYN.

GRACE C. CURRY agt. SARAH COLGAN and others.

Partition issues—Default—Code of Civil Procedure, sections 1544, 1546, 1561, 1579—Practice in action of partition when issues of fact are presented by the pleadings.

In an action of partition, where issues of fact are presented by the pleadings as to part of the lands sought to be partitioned, which issues (after the plaintiff has demanded a jury trial in accordance with section 1544 of the Code) are dismissed by the defendants by default before the jury side of the court, it is error for the defendants to enter judgment dismissing the entire cause of action, including that arising from the lands admitted by the answer to be owned by the parties in common.

The proper practice after the issues are determined in such a case before the jury side, is to have the case go to special term, and after a referee's report (see Code, sections 1561 and 1546) as to liens, &c., on the lands admitted to be held in common, interlocutory judgment should be given (see Code, section 1546) of partition as to the latter lands, and for the defendants as to the issues.

After the defendant's informal judgment by default had been vacated merely because of its informality, on the plaintiff's moving for such a reference as to the lands admitted to be owned in common, the defendants could not have the issues referred to the referee.

Special Term, December, 1885.

Curry agt. Colgan.

THIS action was brought to partition several houses and lots in the city of Brooklyn, left by Dominick Colgan, the father of all the parties. Some of the lands were devised to three of the defendants by Mr. Colgan's will, which was contested by the plaintiff before the surrogate of Kings county, but her objections were overruled and the will admitted to probate, whereupon she commenced this action under section 1537 of the Code of Civil Procedure to partition these lands and also some other lands left by the deceased to all his children in common. The defendant's answer admitted that the latter were held in common by the parties, and pleaded the devise as to the former. A jury trial was demanded by the plaintiff of the issues, under the Code of Civil Procedure, section 1544, and during the absence of the plaintiff's counsel from the court room a dismissal was taken before the jury side of the court, and a judgment entered by the defendant's attorney dismissing the entire complaint, including the cause of action arising from the lands admitted to be held in common. The plaintiff's counsel then moved to correct this error before chief judge GEORGE G. REYNOLDS, the trial judge, without applying to open the default.

Mr. Henderson Benedict, for plaintiff and the motion, contended that the issues alone were submitted to the jury side, and consequently nothing else could be dismissed, and after disposing of the issues the entire case must return to the equity side for judgment.

Mr. T. N. Melvin, for defendants and in opposition to the motion, took the contrary view.

REYNOLDS, *Ch. J.*—The defendant's attorney has mistaken the practice. The action is an equitable one. (*Hewlett agt. Wood*, 62 N. Y., 75.) It is true that a trial of the issues by jury is a matter of right, but the very section of the Code of Civil Procedure (*sec. 1544*) which provides this, shows that it is not to be treated as an ordinary common law action. Issues may be stated as provided by section 970, or they may come

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before the jury simply upon the pleadings, but in either case the action is to be determined at special term by the court in equity. If the issues had been tried before the jury and decided in favor of the defendants, they could not have entered judgment dismissing the complaint on such findings, but the case would have gone to special term for such judgment as ought to follow upon the admitted facts and the findings upon the issues. A default can have no greater effect. The consequence of the plaintiff's retiring from the contest over the disputed facts, was simply to concede that part of the case to defendants. The parties are now to come before the court in proper form to have their rights settled upon the facts as admitted by the pleadings or determined by the default. The judgment must be set aside, with ten dollars costs to plaintiff, to be taxed in her final bill if she succeeds.

Motion granted with ten dollars costs.

AFTER entry of the order on this decision vacating the judgment, the plaintiff's counsel moved, before judge AUGUSTUS VAN WYCK, under the Code of Civil Procedure (*secs. 1561 and 1546*), for the appointment of a referee to ascertain the liens on the lands admitted to be held by the parties in common and whether an actual partition could be had.

Mr. Henderson Benedict, for the motion, argued that the judgment was merely vacated for its informality, with the privilege of recording a formal one, and that the issues could not be referred as the Code of Civil Procedure (*sec. 1544*) prescribed a jury trial.

Mr. T. N. Melvin, in opposition to the motion, argued that vacation of the judgment opened the default and that the issues should be referred to the referee.

VAN WYCK, *J.*—The default of plaintiff at the trial term concludes plaintiff in the matter of the premises which the answer denies are owned in common, and the only premises

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that can be partitioned are those which the answer admits are owned in common, and therefore the reference should be restricted to the ascertainment of the liens on the latter, and on the report of the referee the court must give judgment in favor of the defendants as to the premises not admitted to be owned in common and order judgment of partition of the piece admitted to be owned in common. The matter of costs will be in the discretion of the court, and it cannot be assumed that the court will do an injustice to defendants in respect thereto.

Motion granted.

SUPREME COURT.

THOMAS H. GREEN and JOHN GREEN, plaintiffs, agt. ISAAC A. ROSA, sheriff of Montgomery county.

Evidence—Competency of, in replevin action brought by a vendor against an attaching officer of a fraudulent vendee.

In a replevin action brought by a vendor against an attaching officer of a fraudulent vendee, it is competent to show the fact that, shortly after the purchase, the vendee made a general assignment for the benefit of creditors. The recitals contained in it are not, however competent evidence.

In such a case, the schedule and inventory made by the assignor, subsequent to the assignment and pursuant to the statute, are not admissible evidence. The inventory would not tend, as against the officer, to establish the assignor's liabilities.

Third Department, General Term, November, 1885.

Before LEARNED, P. J., BOCKES and LANDON, JJ.

APPEAL from a judgment in favor of plaintiffs, rendered at the Montgomery circuit.

On the trial the plaintiffs, for the purpose of showing the insolvency of the assignor, offered in evidence the general assignment of McGovern, which was admitted against the objection of the defendant. Also, for the same purpose, a schedule

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and inventory made by Thomas F. McGovern, containing the names of his creditors and statement of assets submitted to the county judge January 28, 1884, and filed in the Montgomery county clerk's office September 27, 1884, which was admitted against defendant's objection. The trial of this action was had three days after, September 30, 1884. Plaintiffs' counsel read from the schedule the amount of indebtedness and amount of property, which was objected to by defendant as proof of the value of the assets or liabilities or book accounts, which objection was overruled. Same objection and rulings to plaintiffs' reading from affidavit to inventory. Objection was also made by defendant to the reading of the assignment to the jury, on the ground that the recitals in it were not evidence against the defendant. The court overruled the objection. Other facts are stated in the opinion of the court.

Edward J. Meegan, for appellant.

I. It was error to permit the admission in evidence of the general assignment of McGovern, made a month after the sale of plaintiffs to him, "for the purpose of showing the insolvency of the assignor." It was also error to permit the recitals in the assignment to be read to the jury. 1. To succeed, the plaintiffs should show the insolvency of the purchaser at the time of the sale to him. That he became insolvent a month afterwards would not give the plaintiff a right of action (6 *South. Law Rev.*, 481, *art.*). Insolvency is never presumed, and it was incumbent on the plaintiffs to prove it (*Walrod agt. Ball*, 9 *Barb.*, 271). 2. The offer of the plaintiffs was to show the insolvency of McGovern, but when? At the date of the assignment was manifestly immaterial, as it would not be proof of a fact anterior to its date, because it could not act retrospectively (*Lawson on Pre. Evi.*, 190). Illustrations are given by Mr. Lawson as follows (*pp.* 190, 191): 1. A deed is signed in 1854 by Henrietta C., her maiden name. There is evidence that in 1860 she was known as Mrs. D. There is no presumption that she was mar-

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ried in 1854 (*Erskine* agt. *Davis*, 25 *Ill.*, 251). 2. Harriet G. executes a deed in 1854. The question is, whether she was married at the time. There is evidence that she was then over twenty-five years old. This raises no presumption that she was then married (*Erskine* agt. *Davis*, 25 *Ill.*, 251). 3. Depositions out of the state are allowed to be taken before "any judge or justice of the peace." A commission is issued to Texas. Depositions are taken before one B., on June 5, 1848, and it is officially certified, on June 29th, that B. is a justice of the peace. There is no presumption from this that B. held that office on June 5th (*Bareli* agt. *Lytte*, 4 *La. Ann.*, 557). 4. A. made a contract in 1860. In 1864 he was insane. There is no presumption that he was insane in 1860 (*Taylor* agt. *Cresswell*, 45 *Md.*, 422). 5. M. committed a burglary in 1880, in the house of J. In 1881 M. was tried, and it appeared on the trial that J. was married. This raises no presumption that J. was married at the time of the burglary (*Murdock* agt. *State*, 68 *Ala.*, 567). 6. A bankrupt in 1837 makes a scheduled return of his property. It is afterwards discovered that in 1835 he owned certain property which was not included in the schedule. There is no presumption that he owned this property in 1837, for the presumption is that he did not commit a fraud (*Powell* agt. *Knox*, 6 *Ala.*, 634).

II. It was also error to admit the alleged schedule and inventory of McGovern in evidence, for the purpose of showing the insolvency of McGovern. It was error likewise to permit the plaintiff's counsel to read from schedule the amount of indebtedness and amount of property, as well to read from the affidavit attached thereto, and the court erred in its charge relating thereto. 1. The assignment bears date January 9, 1884. The attachments were issued and property seized January 17, 1884. The schedule and inventory bear date and were verified January 26, 1884, and filed September 27, 1884, a few days before the trial of this case. 2. See authorities under point I. 3. After a debtor has assigned, his acts or declarations are no longer admissible evidence. He is a stranger to the rights of the interested.

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parties, and his doings and words are mere hearsay and irrelevant (*Minzesheimer* agt. *Mayer*, 66 *How. Pr.*, 484; *Bump on Fraudulent Conveyances*, 587; *Bullis* agt. *Montgomery*, 50 *N. Y.*, 352; *Coyne* agt. *Weaver*, 84 *id.*, 386; *Matter of Mayer*, *N. Y. Daily Reg.*, Feb. 9, 1884). Nor is the debtor's examination in proceedings supplementary to execution admissible (*Wells* agt. *O'Connor*, 27 *Hun*, 426). 4. After the execution and delivery of an assignment in trust for the benefit of creditors, the assignor cannot, by his acts, declarations or admissions, affect the assignment or the rights of his creditors (*Cuyler* agt. *McCartney*, 40 *N. Y.*, 221). 5. Such acts or declarations are not part of the *res gestæ* (*Peck* agt. *Crouse*, 46 *Barb.*, 151). 6. Declarations made a week or two after the assignment are not competent evidence for any purpose (*Ogden* agt. *Peters*, 15 *Barb.*, 560). 7. Schedules of a bankrupt are inadmissible in evidence in a conflict between third persons, and the admission thereof is ground for a new trial (*Turner* agt. *Lee*, 57 *N. Y.*, 667). 8. Nor are the schedules of a bankrupt admissible to show the insolvency of a bankrupt (*Tyler* agt. *Brook*, 68 *N. Y.*, 418; see opinion of RAPPALO, J., at p. 425, commenting on this evidence). The case of *Sibley* agt. *Killom* (19 *N. Y. Week. Dig.*, 190), only holds the schedules to be admissible against the assignee, because if assignor had not made them the assignee would have been obliged to do so.

T. F. C. Clary and *R. J. Sanson*, for respondents.

I. The deed of assignment was properly received in evidence for the purpose of showing the insolvency of the assignor. The paper itself was proper record evidence, and the fact of McGovern making an assignment (of which the paper was the best evidence) within twenty-seven days after representing to plaintiffs that he was "getting along good in his business," and on such representations inducing them to furnish goods on credit, were very proper matters to be taken into consideration by the jury, in determining whether McGovern was insolvent December 12, 1883 (3 *R. S.* [7th ed.], 2276).

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II. For the same purpose, the schedule and inventory, filed under the assignment, were competent evidence of McGovern's insolvency. The objection, that it was not filed in time, is not good. The inventory is to be filed by the assignee with the county judge within twenty days after the execution of the assignment, and the county judge shall file the same in the office of the clerk of the county where the assignment is recorded, but the statute does not say when he must do it. It was filed before offered in evidence (*Laws 1877, chap. 466, sec. 3; amended 1878, chap. 318; Produce Bank agt. Morton, 67 N. Y., 203*).

III. The defendant was not prejudiced by the admission of the assignment and schedule and inventory (*Belmont agt. Coleman, 1 Bosw., 188; Keator agt. Dimmick, 46 Barb., 158*).

LEARNED, P. J.—The plaintiffs sold goods to one McGovern, about December 12, 1883. Afterwards McGovern made a general assignment to one Hayfinger, January 9, 1884. Afterwards creditors of McGovern sued him, and in such suits issued attachments under which the defendant sheriff, &c., by his deputy, seized goods, among them those sold by plaintiffs. Subsequently the plaintiffs commenced this action of replevin, and took the goods; but the same were retaken and retained by giving the usual bond. The ground of plaintiffs' action, as stated, is, that the goods were obtained from them by false and fraudulent representations when McGovern was insolvent, with the design of not paying for the same.

To show McGovern's insolvency at the time of the so-called sale of the goods, plaintiffs gave in evidence his assignment, dated January 9, 1884, and the inventory and schedule dated January 26, 1884, and filed in the county clerk's office September 27, 1884. To this defendant objected. Plaintiffs read therefrom the amount of indebtedness and of property, and also the assignment, to all which defendant objected.

At the conclusion of the charge the defendant asked the court to charge that the inventory did not tend to establish

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McGovern's liabilities. The court refused. We think that the plaintiffs might prove the fact that McGovern made an assignment for the benefit of creditors as tending to show that, at the short time previous, when he bought, he had no intention of paying, the act of making an assignment, whether he was then really insolvent or not, was a fact which might have some influence in deciding what his intentions were when he bought, just as if he had sold all his property to any other person. But McGovern's statements in that assignment were not, and still less were the contents of the inventory and schedules, evidence against the defendant of the matters therein contained. These were mere statements made by McGovern out of court, and on the 29th day of January that on such a day, the 9th of January he owed so much and had so much property. Neither plaintiffs nor defendant claimed under the assignment (*Tyler agt. Brook*, 68 N. Y., 418; *Turner agt. Lee*, 57 *id.*, 667).

The evidence of fraud in this case is this: plaintiffs asked McGovern how he was getting along. He said he was getting along good; all right. He testifies that at that time he knew he was insolvent, owing \$3,600 and having \$1,900, and in a month's time he failed. He testifies that he had no intent to defraud plaintiffs when he made the purchase. Of course the question is whether the purchase was made with the design not to pay. We cannot say that there was no evidence to go to the jury on that point.

McGovern's testimony was contradicted by what he had previously sworn to on another occasion, as to his knowledge of his financial condition when he made the purchase, and this was very material on the question of fraud. Therefore, we cannot disregard the error in the admission of evidence above mentioned, an error insisted upon by the defendant in various ways.

Judgment reversed. New trial granted, costs to abide event.

LONDON, J., I concur.

Knowles agt. De Lazare.

NEW YORK COMMON PLEAS.

EDWIN KNOWLES and another agt. MARIUS DE LAZARE and another.

Supplementary Proceedings—Referee—Who should sign subpoena—Code of Civil Procedure, section 854.

In proceedings before a referee supplementary to execution, a subpoena should be issued by and under the hand of the referee, pursuant to section 854 of the Code of Civil Procedure.

Special Term, December, 1885.

MOTION to punish witness for contempt.

Hugo Hirsh, for the motion.

S. C. Baldwin, opposed.

Before VAN HOESEN, J.

In proceedings before a referee supplementary to execution, a witness was served with subpoena under signature of the clerk and seal of the court.

Held, on motion to punish the witness for contempt for failing to attend pursuant to the subpoena, that the subpoena should have been issued by and under the hand of the referee, pursuant to section 854 of the Code of Civil Procedure, and motion denied.

James agt. Coxe.

CITY COURT OF NEW YORK.

ALFRED E. JAMES agt. FRANKLIN COXE, Jr.

Discovery — Of certain correspondence calculated to prove or disprove the defense so as to determine its legal effect before trial is not allowable.

A plaintiff cannot compel the discovery of correspondence in possession of the defendant, for the mere purpose of ascertaining in advance of the trial, whether such correspondence proves a modification of contract pleaded by the defendant and relied on by him as a defense to the action.

General Term, December, 1885.

Before MCADAM, C. J., HYATT and HALL, JJ.

APPEAL from an order directing a discovery.

A. Kling, for defendant and appellant.

G. W. Van Slyck, for plaintiff and respondent.

MCADAM, C. J.—The action is on a written lease of certain apartments let for one year and four days from August 27, 1884, at the yearly rent of \$1,800, payable monthly, in advance. The claim is for a balance of rent for the months of May, June, July and August, 1885. The defense is that in May, 1885, the lease was modified by a new agreement, by which the plaintiff was to receive sixty-three dollars per month to the termination of the lease, in lieu of the rent provided thereby, and that the defendant has satisfied all claims under the agreement as modified. The production of the lease proves the plaintiff's case, and the onus is immediately shifted on the defendant to prove the modification alleged. The plaintiff needs no discovery to establish his case, and the question is practically reduced to this—can he compel the defendant to produce certain correspondence calculated to prove or disprove the defense so that he may determine its legal effect before the trial?

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In *Andrews agt. Townshend* (2 Civ. Pro. R., 76), it was held that where the paper of which discovery is sought does not relate to maintaining the case of the one applying for it, no discovery or inspection can be had. To substantially the same effect are *Shoe and Leather R. Association agt. Bailey* (49 N. Y. Super. Ct. R., 385), and *Mott agt. Consumers' Ice Co.* (2 Abb. N. C., 143), and 2 *Tillinghast & Shearman's Prac.*, 211. In *Chapin agt. Thompson* (16 Hun, 53), the plaintiff sought to examine the defendant before trial, as to matters of defense pleaded, and the court held that an order will not be granted where the applicant only seeks to find out what the opposite party will swear to, so as to enable him to prepare to meet and overcome it. The language of that authority is applicable here, if the case is not. The plaintiff evidently seeks to discover what correspondence the defendant has, in order to determine in advance of the trial whether it proves the modification relied upon by the defendant in his defense. Discovery for such a purpose is not allowable under our rules of practice. It follows that the order allowing the discovery must be reversed, with costs.

HYATT and HALL, JJ., concurred.

SUPREME COURT.

EDMUND CROSLY agt. CALVIN F. COBB.

Appeal—Practice—Code of Civil Procedure, section 22—Label—Evidence.

The method of referring to parts of the complaint as "at" or "between" certain folios, however convenient and easy in the first instance, serves no useful purpose upon appeal, nor does it conform to the spirit of the Code, which requires pleadings to be made out "in words at length and not abbreviated" (*Code of Civ. Pro.*, sec. 22).

When, by inadvertence, an answer has been drawn, referring to the original folios of the complaint, the appeal book should be so printed as to render the pleadings intelligible.

In an action for defamation of character when general damages only are

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claimed, it is not competent for the plaintiff to show that, by reason of the defamatory matter, he was less esteemed by a particular person. A question is not competent, on cross-examination, which does not relate to any matter inquired into in chief. When the trial judge is dissatisfied with the verdict, and sets it aside for reasons which he deems sufficient; on appeal, the burden is on the appellant to show that the order appealed from was erroneous.

Fourth Department, General Term, November, 1885

Before HARDIN, P. J., BOARDMAN and FOLLETT, JJ.

Franklin Pierce, for defendant and appellant.

A. P. Smith, for plaintiff and respondent.

PER CURIAM.—The defendant had a verdict at circuit. The plaintiff moved, on the judge's minutes, for a new trial, which was granted, upon the ground that errors were committed in the reception of evidence, and upon the ground that the verdict was contrary to the evidence. The defendant appeals from the order.

The learned judge who presided at the trial set aside the verdict on his minutes because it was against the evidence, and because of errors committed in the reception of evidence; but no opinion having been written, the exceptions held valid, or the issues held to have been erroneously determined by the jury are undisclosed. Many independent charges, *prima facie* libelous, are contained in the article declared upon. Some of the charges are justified in the answer, and as to others, and perhaps as to all, mitigatory circumstances are alleged.

Before attempting to apply the rules of the law of libel to this case, it is important for the court to know which of the charges are justified in the answer, and to which charges only mitigatory circumstances are pleaded. The mode in which the answer is framed and the case printed, renders it impossible to ascertain, with accuracy, what charges are justified. Twelve clauses of the complaint are referred to in the answer as being between certain folios, which are evidently the folios of the original complaint, and not the folios of the appeal book. Be-

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sides, reference is made in the answer to other parts of the answer by folios which do not correspond with the folios of the appeal book. This mode of pleading and preparing cases is condemned (*Caulkins agt. Bolton*, 98 N. Y., 511).

When by inadvertence, an answer has been drawn referring to the original folios of the complaint, the appeal book should be so printed as to render the pleadings intelligible. Whether the verdict in this case was against the evidence, depends largely upon which of the charges in the complaint were justified in the answer; and being unable to ascertain this fact, the exceptions only will be considered.

A witness called by the plaintiff to prove the publication of the libel, was asked on cross-examination, if the article complained of affected his opinion of plaintiff's reputation. To this the plaintiff objected. The objection was overruled, and an exception taken. The witness answered, that the article did not affect his opinion, and that he did not shun or respect the plaintiff less by reason of the article.

In an action for defamation of character where general damages only are claimed, it is not competent for the plaintiff to show that by reason of the defamatory matter he was less esteemed by a particular person (2 *Roscoe's N. P. Ev.*, 799). Special damages are not claimed in the complaint; or at least, a claim for special damages is not well pleaded therein (1 *Wms. Saund.*, 248; *Towne. S and L.*, sec. 345), and no evidence of special damages was given by the plaintiff. This question was not competent on cross-examination, because it did not relate to any matter inquired into in chief. It was not competent as affecting the credibility or recollection of the witness. It was not competent as affecting the question of damages, for the defendant had no right to attempt to lessen the plaintiff's general damages by showing that special damages had not been occasioned. Usually, a case will not be reversed for the admission of erroneous evidence upon the question of damages when the jury has found that the plaintiff is entitled to no damages. But in this case the damages are not capable of being computed, and

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rest very much in the discretion of the jury. The same evidence was obtained from two other witnesses, and is to the effect that no damages were sustained, and how far this evidence may have affected the general result, we are unable to determine. The trial judge was dissatisfied with the verdict and set it aside for reasons which he deemed sufficient, and the burden is upon the defendant to show that the order was erroneous. This, we think, he has not done.

This is one of the cases which, we think, might have been better disposed of upon a case at special term than upon the minutes at circuit (*Hinman agt. Stillwell*, 34 *Hun*, 178).

The order appealed from must be affirmed, with costs to abide the event of the action.

All concur.

SUPREME COURT.

THE PEOPLE *ex rel.* RICHARD W. RYAN agt. THE CIVIL SERVICE SUPERVISORY AND EXAMINING BOARDS OF THE CITY OF NEW YORK, &c.

Civil service laws—New York (city of) officers and employees of the aqueduct commission are local officers and subject to the civil service regulations of the city.

Officers and employees of the aqueduct commission, created and appointed under and by the provisions of chapter 490 of the Laws of 1888, are local officers; the functions they are to perform are for the peculiar corporate and pecuniary benefit of the corporation of the city; the corporation of the city of New York is liable for their acts; they are agents of the city and the act expressly recognizes the city's liability upon their contracts. The appointees and employees of the aqueduct commissioners should be examined by the civil service boards of the city of New York as local city officers, and not by the state civil service commissioners as state officers.

New York Chambers, December, 1885.

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Cary & Whitridge, attorneys for relator; *F. W. Whitridge*, of counsel.

E. Henry Lacombe, counsel to the corporation attorney for the respondent; *D. J. Dean*, of counsel.

LAWRENCE, *J.*—This is an application for a peremptory mandamus to compel the civil service supervisory and examining boards of the city of New York, and Charles H. Woodman, the secretary thereof, to entertain the application of Richard W. Ryan and notify him to appear for examination pursuant to the New York city civil service regulations:

It appears by the affidavit of the relator that he has applied to the secretary of the said boards for examination for employment by the commissioners for building the new Croton aqueduct, and that his application has been refused on the ground that the said commissioners are not officers of the city of New York and their employees are not included within the civil service of the city of New York. It appears also from the papers submitted on the part of the relator, that in the month of August, 1884, the mayor of the city arranged a certain classification of the civil service of the city of New York, and that in such classification were included the clerks and employees of the aqueduct commission, and that such employees were so included after consultation with the state civil service commissioners, and upon their advice that such employees were persons in the employ of the city and not of the state. It appears from the papers read by the counsel to the corporation that the contrary opinion has been expressed by him and his predecessor in office, and this proceeding has been brought for the purpose of determining whether officers and employees of the aqueduct commission are subject to the civil service regulations of the city or those prescribed by the state civil service commissioners. It cannot be disputed that the aqueduct commissioners are new officers, and that at the time of the passage

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of chapter 490 of the Laws of 1883 creating such commissioners, there were no officers in existence in the city government who were authorized to exercise the powers confided to said commissioners by said act. This, however, is not conclusive upon the question whether the commissioners are to be regarded as state or city officers. Nor does the case of *The People ex rel. Wood agt. Draper* (15 N. Y. Rep., 532) determine the question which is here presented for consideration. That case holds that section 2, article 10 of the constitution of 1846 leaves the legislature at liberty to provide for the election or appointment, in any manner it may deem suitable, of all officers, local or general, whose offices might thereafter be created by law; and also of all other than county, city, town or village officers whose offices were then in existence, but the mode of whose election or appointment was not prescribed by the constitution.

Under that decision the legislature may create a new city office and may prescribe the manner in which the same may be filled, whether by election or appointment, or in any manner it may deem suitable.

The case of the *Metropolitan Board of Health agt. Heister* (37 N. Y. Rep., 661), is to the same effect (*see, also, People agt. Pinckney*, 32 N. Y., 382).

Some light may, however, be thrown upon this question by the decisions which were made by the supreme court and late court of errors in relation to the liability of the city of New York for acts done or omitted by the water commissioners appointed under the acts of 1833 and 1834, under which the Croton water was first introduced into this city. The powers conferred by those acts upon the commissioners therein provided for were very similar, although not specified in the acts so much in detail as those confided to the aqueduct commissioners of 1883.

In *Appleton agt. The Water Commissioners of New York* (2 Hill Rep., p. 482), it was intimated, although not expressly decided by BRONSON, J., in delivering the opinion of the court,

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that the remedy on the contract made by such commissioners was against the corporation of the city of New York.

In *Bailey agt. The Mayor, &c., of New York* (3 Hill, p. 588), it was held that the commissioners appointed under the act of 1834, though appointed by the state, were the agents of the corporation, and that the latter was, therefore, liable for injuries sustained by the plaintiff's land arising from the careless and unskillful construction of a dam across the Croton river. That case subsequently went to the court of errors, and is reported in 2d Denio (p. 433) as *The Mayor, &c., of New York agt. Bailey*, and it was held that the corporation was liable to third persons for injuries sustained by them by the negligent and unskillful construction of the dam in question.

If these cases have not been restricted or modified by subsequent decisions, it would appear that the aqueduct commissioners, although appointed by the legislature, are the agents of the city, and, if the agents of the city, that they are within the provisions of the act in relation to the civil service of the city.

It is said, however, by the learned counsel to the corporation that this case is within the principles stated in *Russell agt. The Mayor* (2 Denio, 461), *Martin agt. The Mayor, &c.* (1 Hill, 545), and *The New York and Brooklyn Saw Mill and Lumber Co. agt. The City of Brooklyn* (71 N. Y., p. 580).

In *Martin agt. The Mayor, &c.*, it was held that a municipal corporation is not liable for the misfeasance or nonfeasance of one of its officers in respect to a duty specifically imposed by statute on the officer; otherwise if the duty is one imposed absolutely on the corporation as such.

In that case the plaintiff sued the corporation of the city of Brooklyn, alleging that while Brooklyn was a village the president and trustees instituted proceedings for the purpose of laying out certain streets, and went on to an assessment of damages pursuant to the statute. That a sum was awarded to the plaintiff for his land, proposed to be taken, and that the commissioners of estimate, &c., reported to the trustees, and that the proper notices were given and published, but though no appeal

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was interposed they had willfully omitted the duty of causing the report to be filed with the clerk of the common pleas of Kings county, so that it could be confirmed. It was also alleged that the board of trustees, after the assessment was returned, resolved that it was expedient to open the streets, provided the parties interested would waive the first report, the filing of the same, and the appointment of commissioners; and that a committee should be appointed to treat and agree with the owners of ground required for the streets, and the plaintiff consented to such waiver, in writing, was willing, &c., and gave notice, &c., but that the trustees refused to proceed in the fulfillment of the agreement.

The court held, in that case, that municipal corporations were not liable for omissions of duty specifically imposed by statute on one of their officers. That, in that respect, the latter are *quasi* civil officers of the government though appointed by the corporation, and that the relation of master and servant did not exist between the corporation and the officers.

In *Russell agt. The Mayor, &c.* (2 Denio, p. 461), it was held, that the mayor and aldermen in making an order for the destruction of a building, pursuant to the statute, did not act as the officers or agents of the corporation, but as magistrates designated by the legislature for the execution of a public duty.

In that case Porter, senator, in his opinion, distinguishes the case of *Bailey agt. The Mayor, &c.*, from that of *Russell*, on the ground that, in the former case, "the corporation had an interest in the grant made by the law;" that "it held a large amount of property under it; had passed ordinances in respect to the execution of the work and the doings of the commissioners; and, in every respect, had made the work their own, and, consequently, had made the commissioners their agents."

In *The N. Y. & B. S. M. and Lumber Co. agt. City of Brooklyn* (71 N. Y., p. 580), it was held, "that a municipal corporation is not liable for the acts or omissions of an officer elected or appointed by it, in respect to a duty specifically imposed upon the

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officer, which is not connected with his duties as agent of the corporation, and in which it has no private interest;" that "it is only liable for the acts or omissions of officers in the performance of duties imposed upon the corporation."

The complaint in that action alleged, in substance, that "by an act to improve the Gowanus canal, in the city of Brooklyn (*chap. 678, Laws of 1866*, and the acts amendatory thereof; *chap. 884, Laws of 1867*; *chap. 793, Laws of 1869*, commissioners were appointed to dock the sides of said canal, the expense to be assessed upon the property; that the commissioners caused docks to be erected in and upon plaintiff's land, adjacent to said canal, but prosecuted the work so negligently that the dock; sank; that by an act passed in 1871 (*chap. 889, Laws of 1871*), it was provided that the common council of the city should cause the docks to be repaired or rebuilt at the expense of the city; that thereby the duty to rebuild the dock on plaintiff's land was imposed upon the city, which it had neglected to perform, to his damage, &c." Upon demurrer to the complaint it was held, that the court "could not take judicial notice that the canal was a public highway, and, in the absence of allegations to that effect, could not presume it to be such; that so far as appeared, the work was for the benefit of individuals solely; that it appears by the amendatory act of 1869, to have been the intention of the legislature to substitute the common council for the commissioners, without affecting the relations of the city to the work; that both bodies were to be regarded as the agents of the state, not of the city, and for their acts or omissions the city was not liable; that the act of 1871 did not impose the duty of rebuilding upon the city, but the directions therein to the common council, it was to be presumed, were given to them as state agents, and that therefore the city was not liable." It was also held "that the fact that the expense of rebuilding was cast upon the city, did not affect its liability."

It will be observed upon examining the three cases last cited, that they are placed upon the ground that the work to be done was not a corporate work, but was either a work for the benefit

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of private persons, or directed to be done by the statute of the state, having no relation to corporate duties or interests.

In that case CHURCH, C. J., at page 584, says: "A municipal corporation is held liable for the acts of an agent it employs to do business for its own corporate or private benefit, the same as a private individual, and this although the agent may be appointed by the legislature or under legislative authority, if it accepts and ratifies the appointment," and he cites approvingly the case of *Appleton agt. The Water Commissioners* (2 Hill, 433), to which I have above referred. He also says that "We have recently held that a municipal corporation is not liable for the omission to perform or for negligence in the performance of a public duty, laid upon an independent officer, in which it has no private interest, and from the performance of which it derives no special or corporate benefit, although it is required to elect or appoint such officer, and although the officer has it in charge, and the negligence imputed is the use of property owned by the corporation," citing *Maximilian agt. The Mayor, &c.* (62 N. Y., 160), and other cases.

FOLGER, J., in delivering the opinion of the court in *Maximilian agt. The Mayor, &c.* (62 N. Y., 170), after having referred to certain cases, and among others to that of *Bailey agt. The Mayor, &c.* (2 Denio, 433), says at page 170: "It is not always easy to say within which class a particular case should be placed. But when it is determined that the power and duty are given and taken for the benefit of the corporation as a corporate body, and the act to be done is to be done by it through agents of its appointment and under its control and power of removal, there is no doubt of its liability for negligent omission or negligent attempt at performance. When the powers created and duly enjoined are given and laid on officers to be named by the corporation, but for the public benefit and as a convenient method of exercising a function of general government, and the corporation has no immediate control nor immediate power of removal of those officers, nor of their subordinates and servants, then it is not liable for their negligence, omission or action."

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In that case it was held that the city corporation was not liable for the negligence of an employee of the commissioners of charities and correction in driving an ambulance wagon belonging to the city which struck and caused the death of the plaintiff's intestate, and it was held that the duties of such commissioners were public in their character, and that from their performance no special corporate benefit is derived.

Is it not, however, clear that from the work to be performed by the aqueduct commissioners a special corporate benefit will be derived by the city of New York, and can it not with much force be urged that, under the decision in the *Maximilian case* and the cases of *Bailey agt. The Mayor, &c.*, and *Appleton agt. The Water Commissioners (supra)*, the aqueduct commissioners, though appointed by the state, are to be regarded as agents of the city, and therefore city officers? As I have already said, the duties which were to be performed by the water commissioners under the acts of 1883 and 1884 were very similar to those confided to the aqueduct commissioners under the act of 1883, and it seems to me that if the former commissioners were regarded as the agents of the city, the latter must be also.

By section 1 of the act of 1883, chapter 490, the mayor, comptroller and commissioner of public works, and certain individuals therein named, are appointed commissioners for the purpose of supplying the city with an increased supply of pure and wholesome water. The salary of the commissioners is to be fixed by the board of estimate and apportionment. The commissioner of public works is to prepare plans, &c., which are to be submitted by him to the commissioners, who may adopt, modify or reject the same in whole or in part. The plans are to be filed, &c. Maps are also to be prepared by the commissioner of public works, to be filed as in the act specified; and the counsel to the corporation, for and on behalf of the mayor, aldermen and commonalty of the city of New York, is required to apply to the supreme court for the appointment of commissioners of appraisal, to appraise the compensation to be made to the owners, &c., of the real estate.

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proposed to be taken, &c., for the purpose indicated in the act. The fee of the lands taken is to be vested in the mayor, aldermen and commonalty of the city of New York. The corporation counsel is to present the report of the commissioners for confirmation. The awards made by the commissioners, when confirmed, are to be paid by the city within four months. In case of default, a right of action therefor is given to the party in whose favor the award is made. It is also provided that the aqueduct commissioners, subject to the approval of the board of estimate and apportionment of the city of New York, may agree with the owners, &c., as to the amount of compensation to be paid to such owners for the taking or using and occupying of real estate.

By section 25 of the act, upon filing the oath of the commissioners of appraisal, &c., the commissioner of public works shall from time to time, as may be necessary, prepare and submit to the aqueduct commissioners and to the counsel to the corporation, forms of contracts and specifications and bonds for the faithful performance thereof. It is further provided that said forms shall be either approved or rejected by the said aqueduct commissioners, and shall be approved as to form by the counsel to the corporation; and in case of rejection of the same, said commissioner of public works shall prepare and submit other forms, &c. It is further provided that the aqueduct commissioners shall determine what provisions shall be embodied in said contracts in order, so far as may be possible, to save the city from loss, embarrassment and litigation by reason of any work done or supplies furnished thereunder.

By section 30 it is provided that the contracts when awarded shall be executed in triplicate by the contractor or contractors on the one part and the aqueduct commissioners, acting for the city of New York, on the other part. Two of said originals are to be filed, one in the finance department, the other with the aqueduct commissioners, and a copy thereof shall be furnished to the department of public works.

By section 31 the salaries and compensation of the persons

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employed as provided for in this act * * * shall be paid by the comptroller of the city of New York on the certification of the said aqueduct commissioners or of such person or persons as may be designated by them. It is also provided that the various sums of money growing due from time to time under the terms of the several contracts made for the doing of the work and furnishing the material required by this act shall be paid by the comptroller, &c., on the certificate of the said aqueduct commissioners or such person or persons as may be designated by them.

By section 32 the comptroller is directed to raise, from time to time, on bonds of said city such sum of money as shall be sufficient to pay for any real estate and all damage, &c., * * * and also in paying for the construction of said aqueduct.

By section 34 the mayor and comptroller are authorized to sign said bonds, and it is made the duty of the clerk of the common council to countersign the same and affix thereto the seal of the said city.

By section 39 the commissioners shall in every calendar month file in the office of the comptroller of the city of New York an account of all expenditures made by them, or under their authority, and of all liabilities incurred by them during the preceding month, and an abstract of each such account shall be published in the *City Record*.

By section 40 no person shall be appointed by the said aqueduct commissioners as inspector or superintendent who shall not be certified by at least three members of the commission to be competent, &c., and by section 41 the commissioners are authorized to provide suitable offices, &c., * * * and to employ a secretary and all necessary clerks, messengers and employees, subject to the approval of the board of estimate and apportionment of the city of New York.

It is apparent from the provisions of the act that the work confided to the aqueduct commissioners is a city work, and one in which the corporation has a direct corporate and pecuniary

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interest. It is also conceded that the corporation has accepted the appointments made by the act of 1883, and is proceeding to avail itself of the provisions in said act contained. This seems to me to bring the case within *Appleton agt. The Water Commissioners* (2 Hill, 433), cited and approved by CHURCH, C. J., in his opinion in the *N. Y. & B. S. M. and L. Co. agt. The City of Brooklyn* (71 N. Y., 584). The case seems to be distinguishable from that of *Maxamilian agt. The Mayor* (62 N. Y., 160), on the ground stated by FOLGER, J., in his opinion at page 170. It is hardly necessary to cite an authority to show that the work in question is a city work or purpose, but if it be necessary, the opinion of EARL, J., in *The People ex rel. Murphy agt. Kelly* (76 N. Y., 487), is conclusive. The learned judge says: "It is impossible to define in a general way with entire accuracy what a city purpose is within the meaning of the constitution. * * * It would not be a city purpose for the city of New York to build a railroad from that city to Philadelphia, or to improve the navigation of the Hudson river generally, between that city and Albany, although incidental benefit might flow to the city. Such works have never been regarded as within the legitimate scope of municipal government. On the contrary, it would be a city purpose to purchase a supply of water outside of the city and to convey it into the city, and for such a purpose a city debt could be created. So lands for a park for the health and comfort of the inhabitants of a city could be purchased outside of the city limits, yet conveniently thereto." See, also, the opinion of judge EARL in *Walsh agt. Trustees of N. Y. and Brooklyn Bridge* (96 N. Y., 437), in which it is held, that the trustees of the bridge are the agents of the two cities; and see *Ehrgott agt. The Mayor, &c., of New York* (96 N. Y., 274, 275).

On the whole case, I am of the opinion that the officers created and appointed by the act of 1883 are local officers; that the functions they are to perform are for the peculiar corporate and pecuniary benefit of the corporation of the city; that under

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adjudicated cases the corporation of the city of New York is liable for their acts; that they are the agents of the city, and that the act expressly recognizes the city's liability upon their contracts. Such being the case, I do not see how it can be claimed that the appointees and employees of the aqueduct commissioners should be examined by the state civil service commissioners as state officers, and not by the civil service boards of the city of New York as local city officers. If, as has been before shown, they are the agents of the city, they are not the agents of the state. The legislature have simply exercised in their appointment a power which, in the *Metropolitan Police case*, it was held they possessed, to appoint new local city officers, but the exercise of such power of appointment did not change the local character of the office or the officer.

The case of *Whitmore agt. The Mayor, &c.* (67 N. Y., 21), is not in point. That case simply holds that clerks of the district courts of the city of New York are not city, but judicial officers, embraced within the judicial system of the state. The decision in that case only followed the case of *Quinn agt. The Mayor, &c.* (44 How. Pr. R., 266, and 53 N. Y., 627).

It is contended by the corporation counsel that this proceeding is erroneously brought against nominal respondents called the Civil Service Supervisory and Examining Boards of the city of New York; that there is no corporation bearing that name; that the civil service boards have no corporate existence, and that the proper respondents to be brought into court are the individuals who compose the boards.

I think the counsel is right in this position, but as I understand him to assent that there should be an amendment by which the respondents can be properly designated, I shall direct such amendment to be made. Much stress is laid by the learned counsel in his brief upon the inconvenience which will result from a determination that the employees of the aqueduct commissioners are subject to examination by the civil service boards of the city of New York. Such an argument cannot, of course, be taken into consideration, if the court regards it as plain that

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the appointees and employees of the commissioners are not exempt from such examination.

I can discover nothing in the act which entirely exempts such appointees and employees from a civil service examination, and it appears that they have neither been examined by the state board nor by the city boards. The provisions of section 40 in regard to a certificate by at least three members of the commission as to competency and fitness, are confined to appointments of inspectors or superintendents. It is very doubtful whether, in the case of those appointees, the legislature intended that the certificate of the members of the commission should be in lieu of a civil service examination by the state board or by the city boards. It is not necessary for me to express an opinion upon that point; but the fact that a positive provision is made in regard to the certificate of qualification, to be obtained by certain appointees, is strong evidence that the legislature intended that all other appointees should be subject to the general laws of the state in reference to examinations as to qualifications.

Let a mandamus issue in accordance with these views.

SUPREME COURT.

STIMPSON H. BABCOCK agt. **E. O'MEARA GOODRICH**, as executor of the last will and testament of **THOMAS O'HARA**, deceased.

Contract—When a personal one, and rescinded by the death of one of the parties.

If a contract is so far personal that the representatives of one of the parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not so responsible for like failure; in the absence of evidence of intention to bind the representative. **H.**, a merchant tailor, employed the plaintiff to labor in his shop at cutting garments, for a year, at an agreed price per week. While the parties were engaged in the performance of the contract **H.** died and his administrator refused to continue plaintiff's employment:

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Held, that the contract was purely personal, and was liable to be terminated by the death of either party to it, and the death of H. justified his executor in ending the contract and refusing further to go on in its performance.

Third Department, General Term, September, 1879.

Before LEARNED, P. J., and BOARDMAN, J.

THOMAS O'HARA, a merchant tailor, employed the plaintiff to labor in his shop at cutting garments, for a year, at an agreed price per week. While the parties were engaged in the performance of the contract, O'Hara died. After his death, the plaintiff continued his labor for a few days, when the defendant, receiving letters testamentary, paid the plaintiff for all work done, discontinued the business, and refused to longer employ, or pay the plaintiff. The plaintiff presented the executor with a claim for the agreed price per week, for the number of weeks he necessarily remained idle, during the remainder of the year, which was rejected, upon the sole ground that the contract was a personal one, rescinded by the death of O'Hara, and that he was not liable to respond in damages for refusing to complete its performance. The claim was referred, under the statute. The referee found the foregoing facts, and ordered a judgment for the contract price per week, for the time the plaintiff was necessarily idle during the remainder of the year. The case was brought on to be heard upon a case containing exceptions (*Somerville agt. Crook*, 9 *Hun*, 664), the plaintiff asking for a confirmation of the report and for judgment, with costs, the defendant that the report be set aside, and for a judgment for costs.

Scovill & De Witt, for the plaintiff, appellant.

Solomon Judd, for the defendant, respondent.

The following opinion was delivered at special term:

FOLLETT, J.—It is clear the agreement was an entire contract (*Davis agt. Maxwell*, 12 *Metcalf*, 286), and if it had been broken

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without cause by the testator, the plaintiff would have been entitled to recover the contract price, less any amount earned, or which he might reasonably have earned in the same employment at or near the same place (*Costigan agt. The Mohawk R. R. Co.*, 2 *Denio*, 609; 2 *Green. Ev.*, sec. 261).

The authorities are agreed that contracts creating the relation of master and apprentice (2 *Kent's Com.*, 266; *Williams on Exec.*, 727, 1561, 1599; *Whincup agt. Hughes*, *Law R.* [6 *C. P.*] 78); principal and agent (*Story on Agency*, sec. 488; *Wharton on Agency*, sec. —); and master and servant (*Williams on Ex.* [7th ed.], 727; *Add. Con.*, 875; *Wood's Master and Servant*, 306), (in the restricted sense in which the term master and servant was formerly used), are personal contracts, determined, as a matter of law by the death of either party. So, also, are undertakings requiring the exercise of peculiar talent, skill and knowledge of one of the parties to the contract (*Robinson agt. Davidson*, *Law R.* [6 *Exch.*] 269; *Will Exrs.* [7th ed.], 1724–1728; 3 *Redfield's Wills*, 274). Such contracts are presumed to have been founded upon personal considerations, made with reference to the personal qualities of the parties. The defendant claims that the contract in this case, created the relation of master and servant; and also that it was an undertaking requiring the exercise of peculiar talent and skill, and, therefore, determined by the death of his testator.

The performance of this contract by the plaintiff required the exercise of personal skill and knowledge, and it could not have been performed by substituted service. Had the plaintiff died during the performance, his representatives could have recovered for his services already rendered, without tendering further performance (*Stubbs agt. The Hollywell Railway Co.*, *Law R.* [2 *Exch.*] 311; *Wolfe agt. Howes*, 20 *N. Y.*, 197; *Clark agt. Gilbert*, 26 *id.*, 279).

As a general rule, if a contract is so far personal that the representative of one of the parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not so responsible for a like

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failure, in the absence of evidence of intention to bind the representative. Evidence of such intention may be furnished by the terms of the contract, or implied from its nature. This contract did not, in terms, bind the representatives, nor can it be fairly inferred from its nature, that the parties intended to continue it beyond the life of either. The business in reference to which it was made depended largely upon the reputation and personal management of both parties. Without express power conferred by will, the business could not be continued by the representative, except for such period, and in such manner as might be necessary to close it *Steadman agt. Fielder*, 20 N. Y., 487; *Bolinsbroke agt. Kerr*, *Law R.* [1 *Exch.*], 222; *Williams Exrs.* [7th ed., 1791]. Nor was the business of such a character that its continuance after the death of O'Hara could have been in the reasonable contemplation of the parties.

In *Taylor agt. Caldwell* (3 B. & S., 826), BLACKBURN, J., said: "There are authorities which we think establish the principle that when, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled, unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case before breach performance becomes impossible, from the perishing of the thing, without default of the contractor." This language is approved in *Dexter agt. Norton*, (47 N. Y., 65); also in *Robinson agt. Davison*, *Law R.* [6 *Exch.*], 275.

In *Farrow agt. Wilson* (*Law Reports*, 4 C. P., 744), Farrow contracted to serve Pugh as a farm bailiff, for at least six months, at weekly wages. During performance, Pugh died, and his administrator refused to continue Farrow's employment. WILLIS, J., said: "In this case, our judgment is for the

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defendants. Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent, and master and servant, the death of either party puts an end to the relation, and, in respect of service after the death, the contract is dissolved, unless there be a stipulation, express or implied to the contrary. It is obvious that, in this case, if the servant had died, his master could not have compelled his representatives to perform the service in his stead, or pay damages, and equally, by the death of the master, the servant is discharged of his service, not in breach of the contract, but by implied condition."

This case differs from the one at bar, in that a farm bailiff is a kind of an agent, having care of lands—a land steward (*Wharton's Law Dic.*; *Bouvier's Law Dic.*, title *Bailiff*), and all authorities agree that the relation of principal and agent is dissolved by the death of either.

In *Dickinson agt. Callahan* (19 *Penn.*, 231), it is said: "No one can trace up this branch of the law very far without becoming entangled in a thicket, from which he will have difficulty in extricating himself."

In the case last cited, the contract was to sell and deliver all the pine lumber which the vendor could manufacture at his saw mill during five years, at an agreed price per thousand. During performance, both parties died. It was held a personal contract, by which the representatives were not bound. This case seems to have been followed in Pennsylvania. (*Bland agt. Winstead*, 23 *Penn.*, 316.) This case is in direct conflict with *Wentworth agt. Cook* (10 *A. & E.*, 42), which was a contract for the delivery of slate during several years, which was held to bind the representatives. Many cases might be cited, but they would only serve to illustrate the truth of the remark above quoted from 19th *Penn.*, 231. A rule applicable to all cases, cannot be extracted from the reported cases, and the decision of each case must depend upon its own circumstances. I think the contract did not establish anything more than a

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personal relation between the parties, and that nothing more can be fairly inferred from the nature of the contract.

No point was made on the argument, by the defendant, upon the exception taken to the ruling permitting the plaintiff to testify in regard to certain transactions.

The conclusions of law of the referee are set aside, and judgment is ordered upon the facts (which are undisputed) in favor of the defendant, with costs.

APPEAL by plaintiff from judgment in favor of defendant and setting aside report of referee.

PER CURIAM.—The single question presented on this appeal is the nature of the contract made between the plaintiff and the defendant's testator and the relation of the parties thereunder. If the contract was founded on personal considerations and had reference to their personal qualities and capabilities and constituted the relation of master and servant terminable at the death of either party, the determination by the special term was correct. We have examined the authorities cited, and are satisfied with the reasoning and conclusion of Mr. justice FOLLETT in his opinion upon which this judgment was founded. The contract was purely personal and was liable to be terminated by the death of either party to it. The death of O'Hara therefore justified his executor in ending the contract and refusing further to go on in its performance.

The judgment should therefore be affirmed with costs.

NOTE.—The foregoing opinions, though slightly ancient, not having been reported, are deemed worthy of preservation.—[Ed.]

Estate of Blanck, deceased.

SURROGATE'S COURT.

In the estate of AARON P. BLANCK, deceased.

Guardian—Of infant—When entitled to letters of administration—Code of Civil Procedure, section 2643.

Where an infant would be entitled, but for his infancy, to letters of administration with the will annexed, the guardian of such infant is entitled to letters unless disqualified for some cause specified in the statute.

New York County, January, 1886.

ROLLINS, S.—This testator died in 1873, leaving him surviving his widow Elizabeth and his son Aaron. To the former he gave by his will the rents, interest, &c., of all his estate, real and personal, subject to certain qualifications not necessary to be here indicated. He provided that, in case she should remarry, the estate should be converted into money, whereof she should receive one-third and his son two-thirds; in case she should remain his widow during her life, he directed that, upon her death, the residue of the estate should go to his son Aaron, if living, and, if not, to such of Aaron's lawful children as might be then alive.

The testator's widow is now 73 years of age. His son Aaron lately died, leaving him surviving his wife Emma (since married and now Mrs. Morrison) and two children, minors then and still, of whom their mother is guardian. As such guardian she asks to be appointed administratrix *c. t. a.* of this estate, which, because of the death of one of the executors and the resignation of the other, is now without any legal representative.

The testator's widow has herself renounced any claim to letters, but she opposes Mrs. Morrison's application upon grounds which would strongly appeal to my discretion if I were at liberty to exercise it. It has been repeatedly held, however, by our courts, that letters of administration must be granted to an applicant who is preferentially entitled under the statute, unless

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he is disqualified for some cause that the statute specifies (*O'Brien agt. Neubert*, 3 *Dem.*, 156; *Coope agt. Lowerre*, 1 *Barb. Ch.*, 45; *McMahon agt. Harrison*, 6 *N. Y.*, 448; *McGregor agt. McGregor*, 1 *Keyes*, 138; *Emerson v. Bowers*, 14 *N. Y.*, 449).

In the case at bar Mrs. Morrison, as guardian of her children, who are legatees under their grandfather's will, is clearly entitled to letters.

It is provided by section 2643 of the Code of Civil Procedure that, upon due application, the surrogate "must" grant administration as follows: 1st, to one or more of the residuary legatees, and 2d, to one or more of the principal or specific legatees "who are qualified to act as administrators."

By section 33, title 2, chapter 6, part 2, Revised Statutes (3 *Banks* [7th ed.], 2291), it is declared that, "if any person who would otherwise be entitled to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons."

NEW YORK SUPERIOR COURT.

BARKER PLACE, executor, &c., agt. JEDEDIAH K. HAYWARD.

Attorney's lien on costs—Code of Civil Procedure, section 779.

An attorney has a lien on motion costs ordered in favor of his client, and as equitable assignee thereof, which lien attaches the instant the costs are due.

Where an order was made at special term, on motion of counsel for defendant, "that an allowance of \$500 is granted to the defendant against the plaintiff, as executor, together with the costs of this action, costs and allowance not to be paid by plaintiff personally"; and on defendant's motion this order was reconsidered and reaffirmed and this decision was sustained by the general term, the defendant appealing to the court of appeals who dismissed the defendant's appeal, with \$116.03 costs to the plaintiff.

Held, that the costs allowed to this plaintiff are motion costs and cannot be offset against any costs in the action due by the plaintiff to the defend-

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ant. That the plaintiff cannot pay the defendant out of money which legally belongs to the plaintiff's attorney, and that these costs are collectable from the defendant under section 779 of the Code of Civil Procedure.

Special Term, December, 1885.

Charles F. Wells, for plaintiff

Josiah Fletcher, for defendant.

O'GORMAN, J.—At the special term of this court an order was made on April 16, 1884, on motion of counsel for defendant, "that an allowance of \$500 is granted to the defendant against the plaintiff, as executor, together with the costs of this action, costs and allowance not to be paid by plaintiff personally."

On defendant's motion this order was reconsidered and reaffirmed, and this decision was sustained by the general term.

The defendant appealed to the court of appeals, who, on November 2, 1885, dismissed the defendant's appeal, with \$116.02 costs to the plaintiff.

Defendant now moves for leave to amend the judgment in his favor for said allowance and costs so that the amount thereof be reduced by offsetting against it *pro tanto* the \$116.02 costs of appeal allowed to the plaintiff.

The plaintiff's counsel, on the other hand, contends that these costs of appeal are the property of the attorney for the plaintiff, and are not subject to any offset in favor of the plaintiff himself. In support of this proposition he cites (*Tunstall agt. Winton*, 31 *Hun*, 220 [December, 1883, affirmed by Court of Appeals, 92 *N. Y.*, 646]; *Marshall agt. Meech*, 51 *N. Y.*, 148; *Naylor agt. Lane*, 50 *Super. Ct. R.*, 97; *Re Knapp*, 85 *N. Y.*, 298; *Ward agt. Craig*, 87 *N. Y.*, 559; *Lachemeyer agt. Lachemeyer*, 17 *Week Dig.*, 310).

The defendant relies on (*Garner agt. Gladwin*, 12 *Week Dig.*, 9 [Supreme Court, General Term, March, 1881]; *Hoyt agt. Godfrey*, 5 *Civ. Pro. R.*, 118 [Common Pleas Court, General Term, November, 1882]; *Callin agt. Adirondack Co.*, 22 *Hun*, 496).

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I have examined these decisions and in my opinion the weight of authority favors the conclusion that the attorney has a lien on motion costs ordered in favor of his client, and as equitable assignee thereof, which lien attaches the instant the costs are due. That the costs in this case are motion costs. That they cannot be offset against any costs in the action due by the plaintiff to the defendant. That the plaintiff cannot pay the defendant out of money which legally belongs to the plaintiff's attorney. And that these costs are collectible from the defendant under section 779 of the Code of Civil Procedure.

The defendant's motion is, therefore, denied, with ten dollars costs.

CITY COURT OF NEW YORK.

EMILIA LABLACHE, plaintiff and respondent, agt. JOHN KIRKPATRICK *et al.*, defendants and appellants.

Justice's court — Costs — On recovery for less than fifty dollars, where independent counter-claims are interposed and extinguished — Code of Civil Procedure, sections 2865-3228.

The plaintiff sued for \$333.33, and the court found that the plaintiff was entitled to recover this sum, but the recovery was reduced by independent counter-claims to \$5.20:

Held, that as the sum total of the accounts of both parties, proved to the satisfaction of the court, exceeded \$400, a justice's court would not have had jurisdiction of the action, and for this reason the plaintiff was entitled to full costs.

General Term, December, 1885.

APPEAL from an order made at special term denying an application to set aside the taxation of the plaintiff's costs and denying a motion made by the defendants for a direction to tax costs in their favor.

Arnoex, Rich and Woodford, for defendants and appellants.

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Olin, Rives and Montgomery, for plaintiff and defendant.

McADAM, C. J.—The action was commenced to recover \$333 damages upon an undertaking executed by the defendants upon the granting of an injunction in the supreme court of the city of New York in an action wherein the plaintiff herein was the defendant. The defendants herein were the sureties upon said undertaking. It was in the sum of \$500, and was conditioned that the plaintiff in that action would pay to the defendant therein (plaintiff here) any damages she might sustain by reason of the injunction, if the court finally decided that the plaintiff in that action was not entitled thereto; such damages to be ascertained and determined by the court or by a referee appointed by the court, or by a writ of inquiry or otherwise, as the court might direct.

The damages were ascertained by the superior court in one of the forms contemplated by the undertaking, and the damages were fixed at \$333.33, the amount claimed in the complaint herein, and this action is brought to recover the amount so ascertained and determined. The defense relied upon was a counter-claim against the plaintiff on two judgments, which were assigned to the defendants before suit brought. Upon the trial the plaintiff was allowed the amount of her damages, with interest, aggregating \$349.26, and the defendants were allowed the amount due upon the judgments, with interest, aggregating \$344.06, and for the balance due, \$5.20, the court awarded judgment in favor of the plaintiff.

The plaintiff and defendants claimed costs. The clerk taxed the bill presented by the plaintiff, and declined to tax the bill presented by the defendants, and from an order made at special term declining to set aside the taxation in favor of the plaintiff and refusing to direct the clerk to tax costs in favor of the defendants, the present appeal is taken. The question presented, therefore, is, which of the parties litigant, plaintiff or defendant, is entitled to the costs. Ordinarily a plaintiff recovering less than fifty dollars cannot recover costs, but must pay

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costs to his adversary, and we are called upon to determine, whether the present case falls within the general rule, or some exception to it. We will consider the exceptional rules first, because, if an exceptional rule applies, the general rule does not.

The Code allows full costs to a plaintiff, upon the rendering of a final judgment in his favor (*Code, sec. 3228*) in an action specified in section 2863 of the act (*sec. 3228, supra, subd. 2*), without regard to the amount recovered. Section 2863 refers to actions wherein justices of the peace have no jurisdiction, and subdivision 4 of that section deprives such justices of jurisdiction, "where, in a matter of account, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400," so that if the present case falls within that subdivision, the plaintiff is entitled to costs, having recovered a final judgment in her favor, and this without regard to the amount thereof.

This subdivision and the one in the former Code, from which it is taken, have already received judicial interpretation. The subdivision in question does not apply to a case where there are opposite demands, and the accounts are connected by originating in the same transaction, and the balance is the debt, because, if the plaintiff had given the proper credit instead of suing on one side of the account only, the balance due might have been sued and recovered in a justice's court (*Gregory agt. McArdle, 1 How. Pr. [N. S.], 187*). But where the accounts are not connected by originating in the same transaction, and the counter-claims or cross-accounts of the defendant are disconnected with the plaintiff's account and exist independently of it, it is not a case where the plaintiff is bound to know of the counter-claim in advance so as to be required to strike a balance for the purpose of bringing the suit within the jurisdiction of a justice's court.

This is particularly so in this case, for the counterclaims were probably unknown to the plaintiff when the action was commenced, and exist only by virtue of assignments which the

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defendants procured evidently for their protection against the claim of the plaintiff, the amount of which had previously been ascertained and fixed by proceedings in the superior court. The "sum total of the accounts of both parties, proved to the satisfaction of the court, exceeded \$400" within the proper intent and meaning of subdivision 4 of section 2863 of the Code, and the plaintiff, in our judgment, became entitled to costs upon her recovery, though it was but for \$5.20.

In *Ex parte Mills* (10 *Wend.*, 557, *note*) the court held that a plaintiff recovering less than fifty dollars in a court of record is not entitled to recover costs, though his claim, as established at the trial, exceed \$200, if it be reduced by payments. If reduced by set-offs, however, he is entitled to costs.

To the same effect is *Lamoure agt. Caryl* (4 *Denio*, 370). The counterclaims pleaded by the defendants were in no sense payments, but in the nature of set-offs. In *Boston, Mills agt. Cull* (8 *Abb.* [*N. S.*], 319) it was held that a plaintiff, who sues in a court of record, in an action arising on contract and for the recovery of money only, and who recovers judgment for less than fifty dollars in consequence of a counterclaim interposed and established by the defendant in the action, is entitled to the costs of the action, provided his claim, together with the defendant's counterclaim, exceed \$400 in amount.

In *Griffin agt. Brown* (35 *How. Pr.*, 372) it was held that where the plaintiffs sued to recover of the defendants \$500 for the lighterage and storage of grain, and the defendants interposed a counterclaim for more than that amount for wastage and conversion of the grain, and claimed a balance in their favor, and the referee, on adjusting the claims on each side, found in favor of the plaintiffs a balance of five cents, it was held that the plaintiffs were entitled to costs.

In *Hayes agt. O'Reilly* (*Daily Reg.*, July 1, 1884) the question was considered by the special term of this court, and after reviewing the cases it was held that where the defendant interposed an independent counterclaim of \$1,400 to a demand of \$1,700, and the counterclaim is extinguished on the trial, the

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plaintiff was entitled to costs, although he recovered but six cents. The question ought, by this time, to be considered settled.

The order appealed from was properly made and must be affirmed, with costs.

HALL and HYATT, JJ., concurred.

Affirmed by common pleas, general term, January 5, 1886.

SUPREME COURT.

JACOB SPRING and JOHN H. SPRING agt. WILLIAM T. QUANCE.

Promissory note—Given for a patent right, such fact not being indicated on face of note is void—Laws of 1877, chapter 65.

A promissory note given and taken by plaintiffs, for a patent right, which fact was not indicated upon the face of the note as required by statute (*Laws of 1877, chap. 65*), which statute makes such taking a misdemeanor, cannot be enforced by plaintiffs and in their hands at least is absolutely void.

Whether plaintiffs can recover the consideration for which the note was given? (*Quære.*)

Special Term, December, 1885.

ACTION upon a promistory note. Defense that note was given for a patent right, which fact was not indicated upon the face of the note as required by the statute, and the note was therefore void; the facts are all conceded; the only question is whether the note is valid or void.

S. L. Snyder, for plaintiffs.

A. C. & E. C. Woodruff, for defendant.

WILLIAMS, J.—The statute (*chap. 65, Laws 1877*) provides in substance, "Whenever any promissory note shall be given

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for a patent right, the words 'given for a patent right,' shall be written or printed on the face of the note, and such a note in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder; and any person who shall take, sell or transfer such a note without such words on its face, knowing what the note was given for, shall be guilty of a misdemeanor."

This statute does not in express terms provide the note shall be void; it does make the taking of the note a misdemeanor, and it in effect provides the note shall not be given without these words upon the face, because it provides whenever any such note shall be given it shall have these words upon its face. It seems to me to follow, therefore, that this note was taken by plaintiffs in violation of the statute; that the statute prohibits the giving or taking of such a note. If I am right about this proposition, it is difficult to see how I am to avoid the necessary conclusion that the note is utterly void.

The case seems to be analogous to those cases decided under the statute of 1840, prohibiting banking associations from issuing or putting in circulation any bill or note unless payable on demand without interest. In *Leavitt agt. Palmer* (3 N. Y., 32), which was an action relating to some of these bills or notes, the court says: "I feel no difficulty in agreeing with the supreme court, that these notes are illegal and void. They were issued in direct violation of a statute which provides, 'no banking association shall issue or put into circulation any bill or note of said association unless the same shall be made payable on demand without interest, and every violation of the statute is made a misdemeanor.'"

As the issuing of the notes was expressly prohibited by law, it is impossible to maintain that they are valid securities. To hold that they can be enforced, would be going very far towards defeating the end which the legislature had in view. The legal liability on account of which the notes were issued still remains, but the notes themselves are void."

In *Bank Commissioners agt. Bank* (7 N. Y., 515), which was

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an action relating to some of these notes, the court says: "The notes were made in violation of the statute (of 1840), and were therefore void. No action could have been maintained against the association upon them, in behalf of the original payees, and certainly not in behalf of the endorsee who was himself president of the association, and aided in the violation of the law." This principle is laid down, and these authorities are cited as sustaining it in *Edwards on Bills, &c.*, vol. 1, sec. 485.

In *Barton agt. Plankroad Co.* (17 Barb., 404), the court says: "The contract in question was within the express prohibition of the statute. The section is only prohibitory in its terms; it does not declare in so many words that all such contracts shall be void, but that is not necessary. Every act done against a prohibitory statute is not only illegal but absolutely void; the court cannot assist an illegal transaction in any respect. It has been repeatedly decided that all contracts contrary to the provisions of statute, are void, and it is a general rule that courts will not aid either party in enforcing an illegal executory contract."

In *Palmer agt. Minor* (8 Hun, 346, 347), a note given under a statute of Pennsylvania, like the one now existing in this state, was assumed to be void as between the original parties and those who stood in no better position than the original parties. I must hold in this case that the note, having been given and taken by plaintiff in violation of a statute which makes such taking by plaintiff a misdemeanor, cannot be enforced by plaintiffs, and, in his hands at least, is absolutely void. Whether plaintiff can recover the consideration for which the note was given, I am not called upon here to decide. The action here is based upon the note and that alone, and, being unable to recover upon the note, the complaint must be dismissed with costs.

I think no principle of estoppel is applicable here. Findings will be prepared in accordance with this decision, and presented for signature.

Matter of Wendell.

SURROGATE'S COURT.

In the Matter of the Accounting of FRED. F. WENDELL, as executor, and LIBBIE PALMER, as executrix of the last will and testament of JAMES M. PALMER, deceased.

Executory accounting—Mutual benefit associations—Moneys received from insurance upon the life of deceased not liable to be applied to the payment of his debts.

A person has a legal right to provide, through a mutual benefit association, insurance for the benefit of his family, and designate the beneficiaries who should receive the benefits thereof after his decease, exclusive of the claims of creditors.

Moneys received from such benefit associations do not become assets in the hands of executors to be accounted for as a part of the estate. The certificates are not, during the life time of a testator, liable to be seized by legal process to pay his debts, and the moneys realized therefrom after his death do not become assets to be accounted for and applied to the payment of the claims of creditors, or for distribution among the next of kin.

Where the testator, during his life-time, became a member of two benefit insurance associations and held the usual certificates of membership therein, the benefit being made payable to his mother, and afterwards, for the purpose of providing for payment of the benefits to the wife and mother, by concurrence of the parties, the mother assigned the certificates to the executor and executrix (the latter being the wife of the testator), by an assignment in writing, by which it was provided that \$6,000 to be realized therefrom should be kept upon trust by the assignees, the interest to be paid to the assignor during her life, and upon her death the principal to the wife. The deceased at the same time made his will, in which he expressed a desire and intention that \$6,000 be safely invested by the executor and executrix (who are the same persons named in the assignment), and the income thereof be paid to his mother during her life, and upon her death the principal fund to his wife, her heirs and assigns, and the balance, \$1,000, to be paid to his said wife. After testator's death, his will was duly proved and the executor and executrix obtained the money.

Held, that these moneys did not become assets in the hands of the executor and executrix, and they were not to be accounted for as a part of the estate, or to be applied to the payment of the claims of creditors.

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Montgomery County, April, 1885.

Sutton & Morehouse, Weller & Moore and W. H. Van Steenberg for sundry creditors.

J. D. Wendell, for executor and executrix.

C. N. Hemcup, for Mrs. C. C. Palmer.

ZERAH S. WESTBROOK, S.—THE executor and executrix are called upon to account by sundry creditors who have filed claims against the deceased incurred by him in his life-time.

An account duly verified has been presented and filed, by which the executor and executrix represent that no property or assets have come into their hands for which they are liable to account. No inventory has been made or filed, and no proceedings have been taken to compel the return of an inventory.

The contesting creditors, however, allege that the executor and executrix received certain moneys from insurance upon the life of the deceased, which are liable to be applied to the payment of debts, and for which they should account, that the proper application thereof may be made.

It appears that the testator, James M. Palmer, died March 10, 1883, being at that time wholly insolvent. In his life-time he became a member of the "Commercial Travelers' Association," and of the "Empire Order of Mutual Aid," benefit insurance associations of this state, and held the usual certificates of membership therein.

The benefits in these companies were made by the testator payable to his mother, Mrs. C. C. Palmer, either when he originally joined or subsequently, and she held the certificates.

On January 3, 1883, for the purpose of providing for payment of the benefits in these associations to the wife and mother of deceased, and by concurrence of the parties, Mrs. C. C. Palmer duly assigned the certificates of membership in said associations to the executor and executrix (the latter being the wife of the testator) by an assignment, in writing, in which it was

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provided that \$6,000, to be realized therefrom, should be kept upon trust by the assignees, and the fund invested and the interest be paid to the assignor during her life, and, upon her death, the principal to the wife.

The deceased, at the same time, and as a contemporaneous transaction, made his will, bearing even date therewith, in which he expressed a desire and intention that the moneys realized from said certificates of insurance should be disposed of as follows: \$6,000 to be safely invested by the executor and executrix (who are the same persons named as assignees in the assignment referred to), and the income thereof paid to his mother, Mrs. C. C. Palmer, during her life, and, upon her death, the principal fund to his wife, her heirs or assigns, and "the balance of said insurance money, viz, \$1,000," to be paid to his said wife.

After the testator's death his will was duly proved, and the executor and executrix obtained the money on said insurance certificates, to wit: \$5,000 from the "Commercial Travelers' Association," and \$2,000 from the "Empire Order of Mutual Aid."

It is not claimed that there is any property liable to be applied to the payment of testator's debts, unless the said insurance moneys can be reached for that purpose.

With the account, as verified and filed, showing that no property has been realized, the burden is cast upon the contesting creditors, to show that the executor and executrix have, or are chargeable with, property or assets liable to the payment of testator's debts.

The testator had the legal right to provide this insurance for the benefit of his family, and designate the beneficiaries who should receive the benefits thereof after his decease, exclusive of the claims of creditors.

This has been the law of this state for many years in respect to general life insurance, aside from the special character of benefit associations (*Laws of 1840, chap. 86; Laws of 1858, chap. 187; Laws of 1870, chap. 277; Laws of 1873, chap. 821*).

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The only restriction in the insurance of a man's life for the benefit of his family is, that he shall not be allowed to expend for that purpose over \$500 annually (*Laws of 1870, chap. 277*).

And when the premiums paid by the husband, in such case, exceed the \$500 annually, limited by the statute, the excess only could be reached by creditors. Payment of an excess of premiums allowed by the statute by a person who is insolvent, would so far be a fraud upon his creditors, and the excess of insurance in such case, and so far could be legally reached and applied to the claims of creditors. This question, however, does not arise in this case.

To bring an insurance upon the life of a man for the benefit of his wife within the acts referred to, it is not essential that it should appear either by the terms of the contract or policy, or by extrinsic evidence, the intention will be presumed from the beneficial nature of the policy (*Brummer agt. Cohen, 86 N. Y., 11*).

It may be that the mere assignment of the certificates by Mrs. C. C. Palmer would have been ineffectual to transfer the moneys over to the trustees (the assignees), had the testator (the assured) seen fit to change the beneficiaries before his death. But at the time of the assignment, and as a concurrent act, he made his will in confirmation of the transfer, and therein and thereby made the wife and mother the beneficiaries under the certificates, and provided for the disposition of the moneys to be derived therefrom for their benefit, substantially the same as in the assignment. That operated as a valid and effectual designation of the wife and mother as the beneficiaries, and continued unrevoked at his death, and the associations recognized it as such. The executor and executrix of the will, as assignees, under the transfer became, by the acts of the parties, trustees of the fund to be realized from the insurance certificates, to receive and dispose of the same as provided by the assignment and will construed together, for the exclusive benefit of the wife and mother. After the sum of \$6,000 is set apart for the income

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thereof to be paid to the mother, "the balance" is given to the wife absolutely and directed to be paid to her.

The contesting creditors assert that the moneys received from the benefit associations became assets in the hands of the executor and executrix, to be accounted for as a part of the estate.

This is a mistake, the certificates were not during the life-time of the testator liable to be seized by legal process to pay his debts, and the moneys realized therefrom after his death did not become assets to be accounted for and applied to the payment of the claims of creditors, or for distribution among the next of kin (*Bown* agt. *The Catholic Mutual Benefit Association*, 33 *Hun*, 263).

The act of the legislature incorporating the "Empire Order of Mutual Aid" (*chap. 189, Laws of 1879*), specially provides that the benefits paid shall be exempted from seizure by legal or equitable process to pay a debt or liability of the deceased party on account of whose death the same shall be paid.

This provision is contained substantially in the by-laws of all benefit associations, though the particular provisions in the charter or by-laws of the Commercial Travelers' Association have not been made to appear.

It may be assumed, however, that they contain the ordinary provisions for paying over the fund provided as a benefit, to the designated beneficiaries. In such cases the benefits are exempted from the claims of creditors.

It is the object of these associations not to benefit the estates of members during life or increase them after death, but to provide funds for the benefit of their families or others specially dependent upon them, after death, who may be designated during the life-time of the members to receive the same (*Loos* agt. *John Hancock Life Ins. Co.*, 41 *Mo.*, 538; *Bown* agt. *Catholic Mutual Benefit Association*, *supra*).

It is held in some cases that the fund provided as a benefit can in no event be passed to the estate of a deceased member, and if the beneficiary named to receive the benefit, in accordance with the by-laws of the association, dies before the assured the

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benefit fails, and cannot be collected by the executor or administrator of the deceased (*Hellenberg Executor agt. The Independent Order of B'Nai Berith*, 94 N. Y., 580).

In this case it is not even shown that the testator ever contributed or paid anything towards sustaining his membership, or that his estate has ever, in any respect, been diminished by reason thereof. The creditors fail to show that they have, in any respect, been injured by reason of the insurance, or that any provision of law has been violated in providing the insurance benefits for the wife and mother of testator; until they do so they have no just grounds for complaint.

They have failed, as it appears to me, to show that the insurance moneys came to the hands of the executor and executrix as assets liable for the payment of debts; and considering the beneficial character of the moneys, every reasonable presumption should be indulged against any such conclusion, that the intention of the testator in making a just provision for his family may not be frustrated, where no rule of law or principle of justice is controvened.

I think that the accounts of the executor and executrix as filed should be finally judicially settled and allowed, and the objections thereto overruled.

A decree will be entered accordingly.

CITY COURT OF NEW YORK.

WILLIAM LESSELS *et al.*, plaintiffs and respondents, agt. **GEORGE A. FARNSWORTH**, defendant and appellant.

Lien—Of livery stable-keepers—Extent of—Laws of 1872, chapter 498, as amended by chapter 145, Laws of 1880.

Where defendant was a livery stable-keeper, and one W. left with him, at his stable, for board and keep, three horses; the same had been at his stables since and prior to January 1, 1884, and on June 30, 1884, W.

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owed the defendant for such board and keep at an agreed price, \$341.50, no part thereof having been paid, and W. had given the defendant his own note for the debt, which covered the board and keep of the horses until about June 30, 1884, but the note had never been paid; on July 3, 1884, the defendant served a notice of his lien on the plaintiffs, and also left a copy for W. at his last known place of residence. The plaintiffs purchased the horses from W. about June 11, 1884. The defendant did not know of the sale until about June 15, 1884, when plaintiffs called to see him in regard thereto, and the plaintiffs had already paid W. for the horses.

Held, that an inchoate lien attached when the horses were placed in the stable; it is waived if the statutory notice be not given; it becomes effective and complete when such notice is given, relating back and embracing all the charges due.

From the time of giving such notice the lien becomes complete, and when made effective by the notice, it covers all charges for care, keep and board while the horses were kept and cared for by the stable-keeper.

The acceptance by defendant of W.'s own note (which was never paid) does not operate as a waiver of his lien, nor can the doctrine of estoppel aid the plaintiffs.

General Term, January, 1886.

Before NEHRBAS and HYATT, JJ.

APPEAL from a judgment entered upon a verdict rendered by direction of the court in favor of the plaintiffs.

Jacobs Brothers, for appellant.

A. J. Delaney, for respondents.

HYATT, J.—It appears from the evidence that the defendant was a livery stable-keeper, and that one Walduck left with him at his stable, for board and keep, three horses; that the same had been in his stable since and prior to January 1, 1884, and that on June 30, 1884, he, Walduck, owed the defendant for such board and keep at an agreed price, \$341.50; that no part thereof had been paid and that Walduck had given the defendant his own note for the debt which covered the board and keep of the horses until about June 28, 1884, but that the note had never been paid; that on July 2, 1884, the defendant

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served a notice of his lien on the plaintiffs and also left a copy for Walduck at his last known place of residence in New York.

The plaintiffs purchased the horses from Walduck about June 11, 1884. The defendant did not know of the sale until about June 15, 1884, when the plaintiffs called to see him in regard thereto, and at this time they, the plaintiffs, had already paid Walduck for the horses.

At the conclusion of the evidence, each of the counsel for the respective parties requested the court to direct a verdict in his client's favor.

The court directed a verdict in favor of the plaintiffs.

The respective parties, in fact, consented to reduce the questions at issue to the matter of the detention of the three horses for a debt, claimed to have been due from the former owner of them to the defendant. The appellant, while urging other grounds of error, concedes that the main question involved is, "was the defendant entitled to detain the horses under his claim of a lien on the same for their board and keep."

At common law a livery-stable keeper had no such lien, unless by special contract to that effect. In this case there was no contract giving a right of lien (*Grinnell agt. Cook*, 3 *Hill*, 485).

The defense, however, rests upon the provisions of chapter 498 of the Laws of 1872, as amended by chapter 145, Laws of 1880, which act now reads as follows:

"Section 1. It shall be lawful for all persons keeping any animals at livery or pasture, or boarding the same for hire, under any agreement with the owner thereof, to detain such animals until all charges under such agreement for the care, keep, pasture or board of such animals shall have been paid; provided, however, that notice, in writing, shall first be given to such owner in person, or at his last known place of residence, of the amount of such charges, and the intention to detain such animal or animals until such charges shall be paid: and such persons may, at any time, maintain an action in any of the courts of the state to enforce such lien, and procure a sale of the said

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animals for the payment of such keeping, pasture and board, and the costs of such action, whenever such sum shall exceed fifty dollars.

"Section 2. From the time of giving such notice, and while such horse or horses are so detained, and no longer, such livery stable-keeper, or other person, shall have a lien upon such horse or horses, for the purpose of satisfying any execution which may be issued upon a judgment obtained for such charges."

This statute is a remedial one, and should be liberally construed to advance the remedy. Its intendment was to give a lien where none existed before (*Eckhard agt. Donohue*, 9 *Daly*, 214; *Ayres agt. Lawrence*, 59 *N. Y.*, 196).

The statutory notice in writing was given, as required by statute, July 2, 1884.

The defendant had not, up to this time, abandoned his lien; his acceptance of Walduck's own note (which was never paid) does not operate as a waiver of his lien (*Day agt. Roth*, 19 *N. Y.*, 456).

An inchoate lien attached when the horses were placed in the stable for keep and board. It is waived if the statutory notice be given. It becomes effective and complete when such notice is given, relating back and embracing all the charges due.

Section 1 expressly provides that the lien intended to be given authorizes the stable-keeper "to detain such horse or horses until all charges * * * shall have been paid" (See *Eckhard agt. Donohue*, 9 *Daly*, 214).

We think that the words in the act "from the time of giving such notice," mean, in their true sense, that from this time the lien becomes complete, and, when made effective by the notice, it covers all charges for care, keep and board while the horses were kept and cared for by the stable-keeper and that this is their more natural and proper construction. A different interpretation of the act would defeat its very object—the giving of a lien where none existed before, upon the performance of the conditions of the statute (*Ogle agt. King et al.*, *City Court, Trial Term*; *MSS. op. filed July 29, 1884*).

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The doctrine of estoppel cannot aid the plaintiffs. They bought from and paid Walduck for the horses in question, before they called on the defendant in regard to the same, so that the defendant did nothing to mislead them into the purchase, and cannot, therefore, be estopped from asserting his lien. The plaintiffs could have protected themselves by calling on the defendant before they paid Walduck for the horses, and ascertaining if he had any lien or claim for their keep and board, for they concede that they knew where the horses were stabled; under the circumstances a prudent person would have done so.

We are of the opinion that the direction of a verdict by the court in favor of the plaintiffs was error. It follows, therefore, that the judgment should be reversed and a new trial ordered, with costs to the appellant, to abide the event.

SUPREME COURT.

W. and S. BLACKINGTON agt. ADOLPH GOLDSMITH.

General assignment — Attachment — Facts which do not warrant an attachment.

The fact that in an assignment no provision is made for the preference for the wages or salaries owing to employees may invalidate the assignment, yet merely because an assignment is void upon its face affords no reason for the issuance of an attachment.

The fact that the assignee does not actually reside in the state does not of itself furnish proof of fraudulent intent.

Special Term, January, 1886.

AFTER Adolph Goldsmith had made an assignment for the benefit of creditors, W. and S. Blackington secured an attachment in a suit against him for \$2,800, on the ground that the assignment was void. Motion is now made to vacate the attachment.

James A. Hudson, for motion.

Tynan agt. Cadenas.

Mr. Goodhart, opposed.

VAN BRUNT, *J.*—The fact that in the assignment no provision is made for the preference for the wages or salaries owing to employees may invalidate the assignment, but merely because the assignment is void upon its face affords no reason for the issuance of an attachment (*Milliken agt. Dart*, 26 *Hun*, 24). The fact that the assignee does not actually reside in the state does not of itself furnish proof of fraudulent intent. The preference of the notes mentioned in the moving papers does not render the assignment void upon its face. A liability may exist because of those notes, and until it is shown that no liability does in fact exist, no fraud can be assumed.

SUPREME COURT.

JOHN H. TYNAN, respondent, agt. MANUEL CADENAS and another, appellant.

JUAN R. HIGUERA and another, respondent, agt. THE SAME, appellant.

Interpleader — Code of Civil Procedure, section 820.

Where two claimants each claim the price of certain goods alleged by each of them respectively to have been sold and delivered by him to the purchaser.

Held, that (the necessary facts required by section 820 of the Code of Civil Procedure being shown) the purchaser is entitled to interplead them and be discharged from liability to either.

Sherman agt. Partridge (4 *Duer*, 648) and *Trigg agt. Hits* (17 *Abb. Pr.*, 436) distinguished.

The principle laid down in *Baltimore and Ohio R. R. Co. agt. Arthur* (90 *N. Y.*, 237) followed.

First Department, General Term, October, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

Tynan agt. Cadenas.

APPEAL from an order denying a motion made by the defendants to interplead the plaintiffs.

Stephen M. Ostrander, for plaintiff and respondent, Tynan.

R. V. W. Du Bois, for plaintiff and respondents, Higuera & Co.

Edward M. Shepard, for defendants and appellants.

The defendants, Cadenas & Coe., by a transaction had with the plaintiff, Higuera, alone purchased, as they supposed, from the firm of Juan R. Higuera & Company, 4,000 pounds of "Picadura" tobacco. The plaintiff, Tynan, was unknown in the transaction. Before the defendants had paid for the tobacco the plaintiff, Tynan, interposed a demand for its price and commenced an action against them demanding judgment therefor. The complaint in the action alleged "that on or about the 17th day of March, 1885, at said city, this plaintiff sold and delivered to said defendants, Cadenas & Coe., at their request, goods, wares and merchandize, consisting of 4,000 pounds of manufactured 'Picadura' tobacco, and at their instance and request (made through their authorized agent, one Juan R. Higuera) duly bonded and shipped on board the steamer 'Glenfyne,' Red D. line, on or about said last mentioned date, the aforesaid goods, wares and merchandize."

Subsequently an action was commenced against them by the plaintiffs, Juan R. Higuera & Company, demanding a like judgment for the price of the tobacco. The complaint in this action alleged "that on the 17th day of March, 1885, at the city of New York, the plaintiffs sold and delivered to the defendants twenty bales of the net weight of 3,000 pounds of manufactured 'Picadura' tobacco * * * that on the 18th day of March, 1885, at the city of New York, the plaintiffs sold and delivered to the defendants ten barrels of the net weight of 1,000 pounds of manufactured 'Picadura' tobacco."

The defendants thereupon, and before answering in either

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case, moved for an order that in each case the plaintiff in the other case be substituted as defendant in place of the defendants Cadenas & Coe.

In the affidavits read upon the motion the plaintiff Tynan further alleged that "said Juan R. Higuera and Emanuel Berger have not, nor has either of them, now or heretofore, any right, title or interest in or to said tobacco, or the proceeds of the sale thereof, either as partners or otherwise, and that their pretended claim thereto, as set forth in their said complaint, is without any foundation, and is wholly false and fraudulent."

And the plaintiffs Higuera & Company further allege that "John H. Tynan, the plaintiff in the cross suit, never has had any interest whatever in these goods or in the money in question."

There was no dispute as to the amount of the debt or that it was due to one or the other of the plaintiffs. The defendants' moving papers also showed that the demand was made in each case without collusion with them.

The motion was denied, the court writing the following memorandum:

LAWRENCE, J.—"The motions in these cases, why the plaintiffs in the respective actions should not interplead, &c., must be denied, with costs, on the authority of *Sherman* agt. *Partridge* (4 *Duer*, 646), and *Trigg* agt. *Hitz* (17 *Abb. Pr.*, 436-9)."

From the order entered upon this decision the defendants appealed.

PER CURIAM.—Order reversed on the rule stated in *Baltimore Co.* agt. *Arthur* (90 *N. Y.*, 237-234, and sec. 820 of the *Code of Civ. Pro.*) Order directed for the interpleader of the plaintiffs in the two suits upon payment by the defendants into court of the sum of \$480 with interest, with \$10 costs and disbursements of appeal to appellants.

Matter of Fernbacher, deceased.

SURROGATE'S COURT.

In the Matter of the Estate of WOLFE FERNBACHER, deceased.

Executors — Code of Civil Procedure, sections 2685, 2686, 2687 — When letters of executors may be revoked for misconduct — Conduct which will authorize their removal pending accounting proceedings.

In construing a will whose provisions are fully set forth *infra*;

Held, that the testator's widow was given a life estate simply, with power to receive and enjoy only the interest and income of the principal which at her death was to go to the testator's children.

Held, also, that under the circumstances here disclosed, the conduct of the executor in turning over the entire estate to the testator's widow for her own use and enjoyment, without exacting from her any security for the protection of the interests of the remainderman, was such wasteful and improvident management of the estate as to demonstrate the unfitness of such executors for the due administration of their trust, and to justify the revocation of their letters.

It seems, that although the general practice is to defer the determination of an application for the revocation of testamentary letters pending accounting proceedings, until such proceedings have terminated, yet under certain circumstances executors may be removed during the pendency of such proceedings.

New York county, November, 1885.

Lauterbach & Spingarn, for executors.

Jacob Marks, for contestant.

ROLLINS, S.—The issues raised by the objections interposed to the accounts of Nathan Fernbacher, executor, and Regina Fernbacher, executrix of this estate, are now on trial before a referee appointed by the surrogate. Pending such trial, the party at whose instance the accounting was ordered seeks the revocation of the testamentary letters heretofore issued to the accounting parties and to Samuel Abraham, their co-execu-

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tor. The ground of this application is the alleged waste and misappropriation by the executors, of the property and assets of the estate and the improvident management of its affairs. The action of her associates in turning over and suffering to be turned over to the executrix individually, and for her own use and enjoyment, the entire estate (after payment of certain legacies bequeathed by the third and fourth clauses of the will, and after certain disbursements specified in the account), and the action of the executrix herself in converting such property to her own use, are the main grounds upon which the petitioner relies in this proceeding.

In determining whether those grounds will support the revocation of letters, it is necessary to construe certain provisions in the testator's will. Of the authority of the surrogate in this regard, under such circumstances as the present, I have no doubt. The reasons that justify the exercise of such jurisdiction in proceedings for the judicial settlement of executor's accounts are equally applicable here. Those reasons are set forth in *Tappen* agt. *M. E. Church* (8 *Dem.*, 187).

The testator's will contains the following provisions:

"*First.* I give and bequeath to my wife, Regina Fernbacher, all my real and personal estate of whatsoever nature and where-soever situate, for her life, she to have the same power of sale and control over said property as I could have in my own proper person, during her said life estate.

"*Second.* I give and bequeath to my children or their heirs, share and share alike, all the rest, residue and remainder of my real or personal property in fee absolutely and forever which shall remain after the life estate given in the first provision of this my will to my wife Regina Fernbacher.

"*Third.* It is my will and I give and bequeath to my daughter, Pauline Fernbacher, \$1,000 of the insurance which is now on my life in addition to that portion of my real and personal property which she shall be entitled to receive under the second provision of this my will.

"*Fifth.* It is my will and I direct that my sons carry on the

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business in which I am now engaged, without change, so long as my wife Regina Fernbacher thinks best.

"*Sixth.* It is my will that my said wife Regina Fernbacher shall have power, and she is hereby authorized in her discretion to pay to all or any one of my children, at any time during her life, all or any part of the share or shares to which all or any one of my said children may be entitled in my real or personal estate under the second provision of this my last will and testament.

"*Seventh.* I appoint my wife Regina Fernbacher executrix and Nathan Fernbacher and Samuel Abraham executors of this my last will and testament, with full power to sell, at public or private sale, at such times and upon such terms and in such manner as to them shall seem meet, in order that the terms of this my last will may be carried out, any and all of the real estate or personal property of which I shall die seized and possessed."

Although the testator left him surviving several children, it is claimed by counsel for the respondents, that after payment of debts and expenses of administration, the testator's widow, by virtue of the first clause above quoted from the will, acquired the absolute title to all the property left by her husband and to the proceeds of such portion thereof as had been or might thereafter be sold, either under the power given by clause first or under that given by clause sixth; and the respondents' counsel insists that if this contention is erroneous, and if the interest of the widow is to be considered as limited to a life estate, she nevertheless has at all times been authorized to exercise for her own benefit absolute "power and control" over the property of the estate, and by consuming the same if she saw fit so to do, to defeat the possibility of remainder to the children.

Neither of these propositions commands my approval.

The grant in clause first of "the same power of sale and control over said property," as the testator himself possessed, does not, when taken in connection with its immediate context, and with after provisions of the will, enlarge to a title absolute the

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interest which is expressly given Mrs. Fernbacher for life, nor does it authorize either complete or partial absorption by her of the principal of the estate.

In support of the claim of the absolute character of the widow's interest and of the invalidity of the dispositions in behalf of the children, several cases have been cited by counsel. In these cases the well known principle has been recognized, that where a testator has made an unqualified bequest or devise, and has thus evinced his intention that the beneficiary should have absolute property in the thing given, a subsequent limitation over is void, because repugnant to the original disposition. Such is the doctrine of *Helmer* agt. *Shoemaker* (22 *Wend.*, 137), *Jackson* agt. *Robins* (16 *John.*, 538), *Annin* agt. *Vandoren* (14 *N. J. Eq.*, 135), *Downey* agt. *Borden* (36 *N. J. Law*, 460), *Stuart* agt. *Walker* (72 *Me.*, 145), *Ide* agt. *Ide* (5 *Mass.*, 500), *Paterson* agt. *Ellis* (11 *Wend.*, 259), *Norris* agt. *Beyea* (13 *N. Y.*, 273, 286), *Dutch Church* agt. *Smock* (*Sexton Ch.* [*N. J.*], 148), *Jones* agt. *Bacon* (68 *Me.*, 34), *Campbell* agt. *Beaumont* (91 *N. Y.*, 464).

But I think it too plain for argument that, whatever may be the true construction of this will, the testator's widow has not acquired by the clause, now under discussion, such an absolute property in this estate as to invalidate the gift over. It is another question, however, whether she is limited to a bare life estate, with the right to demand and enjoy nothing more than the interest and income of a principal that is to go to others at her death, or whether her life estate is coupled with a power on her part to receive such principal in her life-time, and to appropriate it wholly, or in part, to her own use, so that only such portion of it as may not, at her death, have been disposed of, will pass to the children under the second clause of the will.

Wright agt. *Miller* (8 *N. Y.*, 9, 24), decided in 1853, was a case in which A. had conveyed to a trustee certain real estate with a power during A.'s life, and with A.'s consent, to lease or sell the same, and, after making certain disbursements from the proceeds, to pay over the balance "for the reasonable support and

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maintenance of the grantor as she may require the same, and as to the residue thereof, if any there shall be, then upon trust," &c. The court of appeals held that the limitation over for the benefit of A.'s children was valid, the power of disposition retained by A. being limited to so much of the proceeds of the property as might be needed to defray the expenses of her reasonable support and maintenance during her life.

In 1872 the supreme court of New Hampshire in *Burleigh* agt. *Clough* (52 *N. H.*, 267), held, that where a testator gave his wife all his estate "to her use and disposal during her natural life" with a gift over of "what is remaining at her decease," the widow took an estate for life, together with a power practically to defeat the estate of the remainderman, but that the gift in remainder was nevertheless valid as to anything that she might leave at her decease.

In 1875 our supreme court of the fourth department decided *Bell* agt. *Warn* (4 *Hun*, 406). A testator had bequeathed \$1,250 to his daughter, providing that the same should be invested, and that the interest thereon should be paid to her during her life semi-annually, and that if, from sickness or want, there was need to resort to the principal for her support, the executors should do so, even to the exhaustion of the entire fund. The will further provided for a gift over of any portion of the \$1,250 that might remain at the daughter's death. It was held that this gift over was good, though the life interest of the first taker was coupled with a power of disposing of the whole estate if such disposition should be needed for her maintenance.

In *Terry* agt. *Wiggins* ([1872], 47 *N. Y.*, 512), a testator gave the residue of his real and personal estate to his wife "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, if she should require it or deem it expedient so to do." He authorized his executors to invest whatever residue there might be at her decease, &c. By a previous clause in his will, the testator had devised to his widow certain real estate "for her sole and absolute use and disposal." The court held that the terms first above quoted

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were to be discriminated from those quoted later, and that the widow took only a life interest in the residue; the power of disposal not operating to enlarge her estate to absolute ownership, and simply enabling her to encroach upon the corpus of the estate for whatever might be necessary for her personal use and maintenance.

The language of a will construed in 1873 by our court of appeals, in *Taggart agt. Murray* (53 N. Y., 233), was as follows: "All my remaining property I give to my daughter, Cornelia, for her support and comfort, to be held and controlled by her, and at her death to pass to her heirs, or if she leaves no heirs, to be disposed of by her will to whom and for what purpose she deems right and proper." *Held*, that the testator intended a gift of life estate only, the power of disposition by will being superadded, limited, however, upon the event of the life tenant's leaving no heirs.

In 1876 the court of appeals in *Smith agt. Van Ostrand* (64 N. Y., 278), held that a testator's bequest to his wife of a certain sum of money "for her support during her natural life, "and his direction that, upon her death, the "said dower" should be transferred to his three children, when taken in connection with the following provision — "fifty dollars of the above named sum shall be paid her as soon as possible after my decease, and the remainder on or about six months after"—must be construed as a gift of so much of the principal fund as might be necessary for his widow's support and so much only; and that the gift of the remainder, subject to the exercise of the power, was valid and effectual.

Thomas agt. Pardee (12 Hun, 151), was decided in 1877. There a testator gave his wife all his estate, "to be possessed and used by her at her discretion and for her support and comfort during her natural life, having confidence in her that it will be used and retained, and the amount or increase and the residue left sacred to the purposes," &c. This was followed by a gift over of what might be left by the widow at her decease. She was declared entitled to draw principal and interest, so far as the

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same might be necessary, for her support, but the gift over was sustained.

Flanagan agt. Flanagan (8 Abb. N. C., 413), was determined in 1880. By the will there construed a testator had given one-third of the residue of his estate to his wife "to be hers absolutely." He had also given her "the use of all the remainder during her life, and the portion left of such remainder to A. B., &c." It was held, that the words "left of such remainder" implied a right superadded to the rights of a life-tenant to make disposition of the principal, even to its complete exhaustion and the consequent defeat of the limitation over; but it was, nevertheless, held, that such limitation was a valid disposition.

From the cases above cited the case at bar can be clearly distinguished. I find in the language of the will before me nothing that warrants the interpretation that the widow of this testator is entitled to any portion whatever of the principal estate wherein she is given a life interest. By the first clause of the will, on the contrary, whether it is considered by itself or in the light of the remaining clauses, it seems to me that a life interest pure and simple is intended to be conveyed.

In the well known case of *Bradley agt. Westcott* (13 Vesey, 445), Sir William Grant, as Master of the Rolls, construed a will whereby a testator gave certain property to his wife "for and during the term of her natural life, to be at her full, free and absolute disposal and disposition during her natural life." The widow was also given a power of appointment. In default of its exercise there was a gift over to certain designated persons. The court said: "As the testator has given to her (his wife) in express terms an interest for life, I cannot, under the ambiguous words afterward thrown in, extend that interest to the absolute property. I must construe the subsequent words, with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition as a tenant for life can have."

In *Smith agt. Bell* (6 Pet., 68), where a testator had given his personal estate to his wife "to and for her own use and benefit

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and disposal absolutely, the remainder of said estate after her decease to be for the use" of the testator's son, it was held that the wife took a life estate only. MARSHALL, C. J., pronouncing the opinion of the court, said: "If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first.

The first part of the clause, which gives the personal estate to the wife, would undoubtedly, if standing alone, give it to her absolutely. * * * The difficulty is produced by the subsequent words. They are: 'Which personal assets I give and bequeath unto my said wife, to and for her own use and benefit and disposal absolutely.' The operation of these words, when standing alone, cannot be questioned. But suppose the testator had added the words 'during her life.' These words would have restrained those which preceded them; and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit, and to a disposal for the life of the wife. * * * Even the words 'disposal absolutely' may have their absolute character qualified by restraining words, connected with, and explaining them to mean, such absolute disposal as a tenant for life may make."

Brant agt. Virginia Coal Co. (3 Otto, 320), was a case in which a testator had bequeathed to his wife all his real and personal estate "to have and to hold during her life and to do with as she sees proper before her death." FIELD, J., pronouncing the opinion of the court, said: "The interest conveyed was only a life estate. The language used admits of no other conclusion, and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose *consistently with that estate.*" The learned justice added that "where a power of dis-

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position accompanies a bequest or devise of the life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended."

In *Boyd* agt. *Strahan* (36 Ill., 355), a testator's bequest to his wife of all his personal property "to be at her own disposal and for her own proper use and benefit during her natural life," was held to give her a life estate simply.

The following testamentary provision was under consideration in *Corey* agt. *Corey* (37 N. J. Eq., 198): "I give all my estate to my wife for her sole use and benefit for and during her natural life, to be under her control and used by her as she sees fit to use the same, and in case she should find it necessary or see fit to dispose of any part or all of the same, I empower her, &c. * * * After the death of my wife, I order my executors to sell all my estate remaining at her decease and to dispose of the proceeds as follows," &c. Held, that the widow was entitled to a life estate only.

A similar construction was in *Stuart* agt. *Walker* (72 Me., 145), put upon the words following: "All my estate, real and personal, with the right to use, occupy, lease, exchange, sell or otherwise dispose of the same according to her own will and pleasure during her life-time, and so much of the said estate as may remain unexpended and undisposed of by my wife at my decease, I give," &c.

It is claimed by counsel for the executors that by sections 81 and 85, title 2, chapter 1, part 2, Revised Statutes (3 *Banks* [7th ed.], 2189), this testator's widow obtained under the will an absolute fee or interest, subject only to the taking effect of the remainder given to the children, in the event that the power of sale should not be exercised in the widow's life-time.

But these sections by their very terms are only operative where there is an "absolute power of disposition not accompanied by any trust," and in my judgment have no application to the case at bar.

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Upon the authorities above cited, I hold that it has never been possible for Mrs. Fernbacher, by the exercise of any power derived from the will of her husband to acquire any personal interest in the property left by him at his death, or in the proceeds of its sale, than such as pertains to a life estate.

The conclusion thus warranted by decided cases as to the meaning of the first clause of this disputed paper is discovered upon examination to be in harmony with the clauses that follow. The second clause bequeaths to the children "in fee absolutely and forever the residue and remainder of the testator's real or" (*i. e.*, and) "personal property which shall remain after the life estate given in clause first. Here is a disposition of the remainder after a precedent life estate; that is, of what is left after the life estate has been carved out of the fee. There is in these words no suggestion that the life beneficiary, by wielding the power of disposition, can appropriate the entire estate to her own benefit and that the children are to enjoy only such part of the property as the widow may chance to leave at her death. Nor are the provisions in the third, fifth and sixth clauses in harmony with such interpretation. Those provisions, in connection with clause second, show that the testator intended to give his wife a simple life interest, with power of converting the character of the property of the estate, and at her death to give his children the principal of such estate, whether it should then wear its original shape or should theretofore have assumed another.

It is unnecessary to cite authorities in support of that established canon of interpretation, that, in construing a will, the testator's intention must be sought from the instrument as a whole, and that its several provisions must be accorded such enlarging, restricting or qualifying effect, as seems most consistent with the purposes of its maker.

When this will is thus construed there is scarcely room for doubt that the power of sale given to the widow, and that given subsequently to the executors, were intended to be exercised, not for the widow's benefit exclusively, but for the benefit of

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the remaindermen as well, who will be entitled at their mother's death to receive, without impairment or diminution, the principal estate of which she will have had the life enjoyment. In this sense, the power conferred may justly be regarded as one of trust, with which sections 81 and 85, above cited, are in no wise concerned (*Coleman* agt. *Beach*, 97 N. Y., 558; *Thomas* agt. *Pardee*, *Smith* agt. *Van Ostrand*, *Flanagan* agt. *Flanagan*, *supra*).

Now, in view of the relation which the widow and children of this decedent sustained towards the estate, it was clearly the duty of the executors to collect, as soon as practicable, the personal property left by decedent, including, of course, the proceeds of any of the realty sold by them or coming to their hands. This duty they owed to the remaindermen, who were entitled to be informed of the true nature, condition and value of the assets, and to have such of them as were outstanding realized and recovered; and this entirely irrespective of the question whether the executors were or were not authorized to turn over all the property of the estate to the life beneficiary without security for its preservation for those entitled in remainder.

Now, it appears that in 1877 an account was filed with the surrogate by Nathan Fernbacher, Regina Fernbacher and Samuel Abraham as executors. Another was filed by Nathan Fernbacher and Regina Fernbacher in the pending accounting proceeding before its issues were submitted to the referee. In the place of the latter a third has been since submitted.

The latest account shows that, in that of 1877, the executors failed to include certain assets of whose existence they must then have been advised. The statement in schedule G of the last account of the transfer by the accounting parties to the widow of such part of the assets contained in schedule A as had not been applied to the payment of debts and expenses of administration, shows that such assets were so transferred with the knowledge that the widow was about to convert them to her own use and with the object of affording her opportunity

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of so doing. In the account of 1877 the business of the decedent was alleged to have been sold by the widow to her sons Nathan, Isaac and Philip for \$6,000. In the account recently submitted to the referee that business is declared to have been sold for the sum of \$10,000, payable on demand. It is further alleged that "no demand of payment has ever been made, as the widow was directed by the testator prior to his death to give the business to his sons should she see fit, and as she was authorized to do under his will."

No direction of the testator, such as is thus described, would have been effectual to confer the authority claimed, nor is any such authority conferred by the will. The conduct of the executors in omitting, from the first account, assets with which they should then have charged themselves, and which, as I think, they intentionally omitted, the subsequent conduct of these accounting parties in falsely representing the sum for which the testator's business was disposed of, in neglecting to realize, or to make any effort for realizing, the amount for which the account last filed declares the business to have been actually sold, and in surrendering the entire assets of the estate to the widow, furnish sufficient proof of the improvident management of the estate, and of misconduct on the part of the executors to justify their removal from office.

It is urged by counsel for the respondents that, even if his contention respecting the extent of Mrs Fernbacher's interest in the estate is erroneous, her co-executors were not at fault in surrendering the estate into her hands without requiring security for the remaindermen.

The law upon this general subject does not seem to be well-settled.

In *Westcott agt. Cody* (5 John., 350), the chancellor said: "Formerly the legatee, entitled to remainder after the estate for life, was allowed to call upon the legatee for life, not only for an inventory, but for security that the goods should be forthcoming at his decease. But the rule of practice has since been altered on that point." Some years later in *Covenhoven agt.*

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Schuler (2 *Paige*, 122, 132), the chancellor said: "The modern practice in such cases" (that is, in cases of bequest for life with limitation over of specific articles), "is to require an inventory of the articles, and security is not required unless there is danger that the articles may be wasted or otherwise lost to the remaindermen."

It would seem from later decisions of the courts of this state, that, under ordinary circumstances, executors should not turn over property to one who has simply a life estate therein, when such property is given in remainder to another, without obtaining from the first taker security for the protection of the remainderman (*Tyson* agt. *Blake*, 22 *N. Y.*, 558; *Montfort* agt. *Montfort*, 24 *Hun*, 120; *Livingston* agt. *Murray*, 68 *N. Y.*, 485).

Some of the clauses of this will, however, indicate that it was the testator's design to entrust to the life beneficiary the full possession and control of this estate. Where there is an expression in a will of such an intention, its executors are warranted unless there are special circumstances making such a course hazardous in surrendering the principal of the estate to the care of the life-tenant without security (*Fiske* agt. *Cobb*, 6 *Gray*, 144; *Weeks* agt. *Weeks*, 5 *N. H.*, 326; *Tagard* agt. *Piper*, 118 *Mass.*, 315; *Flanagan* agt. *Flanagan*, *supra*; *Smith* agt. *Van Ostrand*, *supra*).

The ground upon which the severity of the old practice has been somewhat abated, is doubtless this: that for the court to decree security in all cases, would often defeat the purposes of the testator. But whenever it has appeared that property bequeathed for life, with remainder over, has been in danger of being wasted, secreted or removed, the courts have held that the interests in remainder were entitled to be protected by compelling the life-tenant to give security (2 *Perry on Trusts* [3d ed.], sec. 541).

The same regard to a testator's intentions which led the chancery court to abandon the practice of requiring security, as of course, upon the mere application of a remainderman whose interests were in no practical danger, demand the exaction of

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security where the testator's intentions are otherwise likely to be frustrated by the conduct of the tenant for life.

Now, in this case, there is the exceptional feature of the purpose on the part of the life beneficiary (a purpose well known to the other executors, and practically countenanced by them), of wasting the fund and of destroying the interests of the remaindermen therein, by converting and appropriating it to her individual use and benefit.

Under these circumstances it seems to me that the executors were grossly remiss in failing to obtain security for the secure transmission to the remaindermen of the principal of this estate.

This failure I regard as evidence of misconduct and improvident management by the executors, and of unfitness for the due administration of their trusts.

It is the general practice to defer the determination of an application of this character, pending accounting proceedings, until such proceedings have terminated, but the undisputed facts and the disclosures of the papers submitted herein, satisfy me that no injustice will be done to these executors by directing their immediate removal.

Let a decree be entered accordingly.

CITY COURT OF NEW YORK.

EDWARD A. RIDLEY *et al.* agt. THOMAS BRADY.

Bond—Liability of sureties upon a bond conditioned that an employee shall account to his employer for goods and moneys entrusted to his care—Distinction between "an official bond" and a bond given in the usual course of business transactions—The application of the Law of Bailment to the latter—State agt. Nevin (Alb. Law J., vol. 32, No. 18, p. 245), and cases there cited distinguished.

There is a well-defined distinction between the liability of a surety upon a bond for the faithful performance of a public official's duties, and that of a surety upon a bond for the faithful performance of the duties of one not occupying such a position—one who is to perform duties in the ordi-

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nary sphere of an employee in the transaction of business between private individuals in a business community.

Sureties upon an official bond are bailees, but they are special bailees, subject to special obligations, and the ordinary laws of bailment cannot be invoked to determine the degree of their responsibility.

The ordinary laws of bailment can be invoked to determine the degree of the responsibility of sureties upon a bond for the faithful performance of the duties of others, not public officials.

In an action upon an employee's bond which, in terms, guarantees that he shall, at all times, "account" for all merchandise intrusted to him, and, if he "fails to account for any such goods," the surety will pay for their value:

Held, that such employee was a bailee for hire, and the law required of him ordinary diligence, and made him responsible for ordinary neglect; he was, in no sense, an insurer of the articles or moneys in his custody, and should not be held responsible for the same, if stolen from him, without any negligence or fault or want of care on his part:

Held, further, that a surety on the bond of such employee has a right to interpose a defense, under a denial of the allegations of the complaint, that such employee has accounted for the goods, admitted to have been stolen, within a legal construction of the terms of such bond.

Trial term, before the court and a jury, December, 1885.

MOTION for a new trial upon the judge's minutes.

E. P. Wilder, for plaintiff.

Van Loon & Capron, for defendant.

HYATT, J.—This is an action upon an employee's bond, which in terms guarantees that he shall at all times "account" for all merchandise intrusted to him, and that if he "fails to account for any such goods" the surety will pay for their value.

The proof is that a package of silk was intrusted to the employee for delivery and was never delivered nor returned.

The defense is, under denials of the allegations of the complaint, that the goods were stolen without any act of neglect on the part of the plaintiff's employee.

Other defenses, to wit:

First. That the bond offered in evidence bears date Septem-

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ber 10, 1883, this being written in ink, and that the part of the bond containing the condition thereof bears date September 11, 1882, the figures being printed, was cured by amendment upon the trial.

Second. That the plaintiffs cannot sue without joining as plaintiffs the executors of Edward Ridley (formerly a member of the firm). This is not pleaded either by demurrer or answer; it is therefore waived (*Code of Civ. Pro.*, sec. 499).

If this does not avail, it is sufficient that the evidence is that the plaintiffs, as surviving partners, have succeeded to all the firm property and are carrying on the firm business, having complied with the statutes as to the continued use of the firm name (*Matthews agt. Stietz*, 5 *Civ. Pro. R.*, 235).

So far, in my judgment, the plaintiffs' position is unassailable.

The question under consideration is, however, the right of the defendant, as surety for the plaintiffs' employee, to interpose the defense, under a denial of the allegations of the complaint, that such employee has accounted for the goods, admitted to have been stolen, within a legal construction of the terms of the defendant's bond.

The plaintiffs insist that this defense is not within the words of the condition of the bond, which are absolute that the employee shall account to his employers and that in default thereof the surety will be responsible.

In support of this position the plaintiffs cite many cases, holding that sureties upon "*official bonds*" are, under all circumstances, liable for the default of those for whom they have engaged to be responsible, in case of any default or their failure to faithfully perform their acknowledged duties.

A careful examination of all the authorities in support of this position, discloses that there is a well-defined distinction between the liability of a surety upon a bond for the faithful performance of a public official's duties, and that of a surety upon a bond for the faithful performance of the duties of one not occupying such a position—one who is to perform duties in the ordinary sphere of an employee, in the transaction of business

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between private individuals in a business community. The authorities hold that the sureties upon an official bond are bailees, but that "they are special bailees, subject to special obligations, and that the ordinary laws of bailment cannot be invoked to determine the degree of their responsibility" (*United States agt. Thomas*, 15 Wall., 341).

In the case of *State agt. Nevin* (*Alb. Law J.*, vol. 32, No. 13, p. 245), the appellant insisted that the contract of himself and his sureties, upon his official bond, to faithfully perform his duties, was simply that which the common law imposed upon a bailee for hire, and that he should not be held responsible for the money that was stolen from him, without any negligence or fault or want of care on his part.

The court held, that the "general rule is to the effect that public officers who are intrusted with public funds and required to give bonds for the faithful discharge of their official duties are not mere bailees of the money, to be exonerated by the exercise of ordinary care and diligence, that their liability is fixed by their bond, and that the fact that money is stolen from them without any fault or negligence upon their part, does not release them from liability on their official bonds."

In the case of *The United States agt. Prescott* (3 How., 588), the court said "that the obligation to keep safely the public money is absolute without any condition expressed or implied; and nothing but the payment of it, when required, can discharge the bond."

The court placed its decision solely and exclusively on the ground of public policy. At page 588 (*United States agt. Prescott, supra*), the court say: "Public policy requires that every depository shall be held to a strict accountability."

In all the cases determining the liability of a principal and his sureties upon an official bond, the doctrine is laid down that the ordinary laws of bailment cannot be invoked to determine the degree of their responsibility, and that the defense upon an unconditioned bond for the performance of official

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duties, that money was stolen without negligence or fault, or want of care on the part of the officer, is not within the condition of such a bond.

It is true that in *United States agt. Prescott (supra)* the court say: "that the objection to this defense is, that it is not within the condition of the bond, and this would seem to be conclusive."

This, however, is not the ground upon which the court based their decision, as before stated the text of the same conclusively shows that such decision rests entirely upon principles of public policy.

If, in the words of BRADLEY, J. (*United States agt. Thomas*), "it is evident that the *ordinary laws of bailment* cannot be invoked to determine the degree of their (*public officials*) responsibility," it is an irresistible corollary that the ordinary laws of bailment can be invoked to determine the degree of the responsibility of sureties upon a bond for the faithful performance of the duties of others, not public officials.

The position of the plaintiffs' driver, who failed to account for articles delivered to him, was one of trust for the benefit of both parties, or of both or one of them and a third party (in this case his bondsman, the defendant); the driver was a bailee for hire, the law required of him ordinary diligence and made him responsible for ordinary neglect (*Story on Bailments*, 25); he was in no sense an insurer of the articles or moneys in his custody, and should not be held responsible for the same, if stolen from him, without any negligence or fault or want of care on his part.

In the case at bar, the defendant (plaintiffs' driver's surety) adduced proof that the articles intrusted to his (the driver's) care were stolen from him, without his negligence or fault, and claimed that an account to the plaintiffs of such fact was within the conditions of the bond and a fulfillment of its terms.

If this is the correct legal construction of the unconditioned bond of the defendant, that the plaintiffs' driver should account for all articles delivered to him, it follows that the driver could

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not be held responsible as a bailee, if a principal upon a bond, sustaining such a defense.

An elementary principle of law then determines that if the plaintiffs cannot recover against the principal (the driver) they cannot recover against his surety, the defendant.

The affirmative defense that the plaintiffs' articles were stolen from their driver, without any negligence or fault or want of care on his part, should have been submitted to the jury.

The omission to so submit and the direction of the court to find a verdict for the plaintiffs, was error.

It follows, therefore, that the verdict should be set aside and a new trial ordered.

NEW YORK COMMON PLEAS.

DANIEL DONOVAN, respondent, agt. ROBERT G. CORNELL,
defendant and appellant.

Order of arrest—Code of Civil Procedure, sections 549-550—Complaint—When cause of action and cause of arrest not identical—When facts authorizing an arrest need not be set out in the complaint, nor is proof of them within the issues that a jury are to try.

Where a complaint alleged a delivery to defendant, a commission merchant, of goods to be sold for cash, for plaintiff, to whom the proceeds, after deducting commissions, were to be paid; that defendant sold the goods but refused to pay over the amount due, and converted it to his own use.

Held, that the action was upon contract and the allegation of conversion of the proceeds was mere surplusage; and a ground of arrest based upon a claim that defendant acted in a fiduciary capacity is extrinsic to the cause of action, so that a motion on affidavits at special term to vacate the order of arrest should have been decided on the merits, and it was error for the court to refuse to pass upon the question, deeming it a proper one for the jury on the trial of the action.

General Term, December, 1885.

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Before LARREMORE, P. J., J. F. DALY and VAN HOESSEN, JJ.

APPEAL from an order of the general term of the city court, affirming an order which denied the motion of defendant to vacate an order of arrest.

The complaint alleged the delivery between March 30 and April 8, 1885, by plaintiff to defendant, "who during that time was a commission merchant," of one hundred and seventy sheep and lambs to be sold for plaintiff for cash, and after deducting defendant's commissions of twenty cents a head, to pay the balance of the price to plaintiff; that defendant sold the sheep and lambs for \$724.35, which he received; that his commissions amounted to \$35.40, leaving due to plaintiff \$688.95, which plaintiff demanded, but which defendant refused to pay, "and converted to his own use." The order of arrest was granted upon an affidavit of plaintiff stating the facts of the complaint and omitting the allegation of conversion.

Defendant moved upon affidavit and an answer denying in part the allegations of complaint and plaintiff's affidavit, and setting up new matter. He alleged that he received no goods from plaintiff, but that all his dealings were with Richard Donovan, plaintiff's father, upon an agreement by which the latter was to consign sheep and lambs to defendant to be sold on commission; that under the custom of commission merchants in his line of business, he accounted to his consignee every Saturday, giving his individual check for the amount of sales, irrespective of his having realized the proceeds, and dating the checks ahead for his accommodation; that he gave his checks, after January, 1883, to the order of plaintiff, at the request of Richard Donovan; that on April 4, 1885, he gave his check (post dated April 8, 1885) to plaintiff's order for \$913.26, in full of sales since the previous Saturday, which check was paid; that between April sixth and ninth he received sheep and lambs alleged, which he sold partly for cash, but mostly on terms of credit as theretofore; that on April ninth,

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he made an assignment for the benefit of creditors, because he could not meet his check given to one Odenheimer, due April ninth, for \$3,423, owing to his failing to realize on sales made by him, including those made for plaintiff, or Richard Donovan.

The motion to vacate the order of arrest was denied. The judge, at special term, in his opinion, considered the question presented by the pleadings and affidavits, viz., whether the fiduciary relation existed between the plaintiff and defendant, or whether the defendant was authorized to mingle the money collected with his own, and so became a mere debtor to plaintiff for the amount due; but the judge would not decide the question, deeming it a proper one for the jury on the trial of the action.

The order denying the motion to vacate the order of arrest was affirmed at the general term of the city court, the opinion rendered stating that the cause of action and the cause of arrest are identical; that the complaint alleged that defendant received plaintiff's moneys in a fiduciary capacity; that in this view of the case the order of arrest should not be vacated at special term, except upon evidence so clear as to leave no possible doubt in the mind of the court upon the questions presented; that this is not such a case, and even assuming that the order of arrest was granted upon extrinsic facts, the justice at special term was correct in refusing to vacate, and for these reasons and the grounds stated in the opinion of the special term the order must be affirmed.

Horace Secor, for appellant.

Joseph C. Wolf, for respondent.

J. F. DALY, J.—The complaint alleged a cause of action upon contract. The allegation of conversion of the proceeds of sale was mere surplusage. On the trial such allegation will be disregarded and plaintiff allowed to recover upon contract (*Conaughty agt. Nichols*, 42 N. Y., 83). Even if the complaint

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alleged that the defendant received the proceeds in a fiduciary capacity, no proof of that allegation would be essential to plaintiff's recovery; a ground of arrest, based upon a claim that defendant acted in a fiduciary capacity, is extrinsic to the cause of action. It is not necessary to make such an allegation in the complaint in order to sustain an order of arrest. Where such allegation is contained in the complaint, but no order of arrest has been granted, the defendant would not be subject to execution against the person (*Segelken agt. Meyer*, 94 *N. Y.*, 473).

It follows from these authorities that the cause of action here and the cause of arrest are not identical, and that the jury, upon the trial of this action, will not have to pass upon the questions which are involved in the arrest of defendant. It was the duty of the court to decide upon the pleadings and affidavits whether the relation between plaintiff and defendant was one of personal trust and confidence in the latter, or that of consignee and commission merchant, as alleged in the answer (*Feuntes agt. Mayorga*, 7 *Daly*, 103). And see on this subject *Merrill agt. Thomas*, 7 *Daly*, 395; *Clark agt. Pinckney*, 50 *Barb.*, 226; *Duguid agt. Edwards*, *id.*, 288; *Sutton agt. De Camp*, 4 *Abb. (N. S.)*, 483; *Stoll agt. King*, 8 *How. Pr.*, 298.

The city court did not examine the question presented by the affidavits in the light of this duty, but referred it to the jury on the trial. This is the express decision of the special term; and the general term, while it does state that "assuming that the order of arrest was granted on extrinsic facts, we are of opinion that the justice was correct in refusing to vacate," finally concludes that, for these reasons and "upon the ground stated in the opinion of the court at special term," the order must be affirmed. This puts the affirmance upon the ground that in the language of the special term opinion "the jury will be called upon to weigh and determine when the cause is tried" the question of right to arrest, "which cannot be intelligently decided in the present instance in advance of the trial." Under the decision in *Segelken agt. Meyer*, above cited, this view appears to be erroneous, and the order should be reversed to

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the end that the motion to vacate the order of arrest may be heard upon its merits.

VAN HOESEN, *J.*—This action is not for the conversion of personal property, and an order of arrest could not be granted under section 549. The action is for money had and received by a factor, and the only authority for an order of arrest is the third subdivision of section 550. The facts authorizing an arrest should not be set out in the complaint, nor is proof of them within the issues that the jury are to try. A jury could never, therefore, pass upon the question which chief justice McADAM said, in his opinion, he would leave to them for decision. The question is not to be decided by a jury, but by a judge at the special term, and therefore I concur with judge J. F. DALY in reversing the order.

LARREMORE, *P. J.*—The order is one affecting a substantial right, and is properly appealable within subdivision 3, section 8191 of the Code of Civil Procedure. The facts alleged in the complaint establish an action for conversion, the plaintiff claiming the identical proceeds realized from the property to be sold. That the prayer of the complaint demands a money judgment in no way changes the form of the action (*Trunninger agt. Busch*, 7 *Daly*, 124; *King agt. Arnold*, 84 *N. Y.*, 668; *Greentree agt. Rosenstock*, 61 *id.*, 583). It is true that the answering affidavits used upon the motion to vacate the order of arrest show that the transaction between the parties was one *ex contractu*, but the facts alleged in the complaint (as before stated) characterize the transaction, and the plaintiff must stand or fall upon their proof, as alleged in his complaint.

The order appealed from must be affirmed, with costs.

Kaiser agt. Kaiser.

CITY COURT OF NEW YORK.

MATHILDE KAISER agt. ISIDOR KAISER.

Benevolent society—Designating beneficiary—Meaning of the term "legal heirs"—Revocation by will.

Solomon W. Kaiser joined the "Mutual Relief Association," and designated "his legal heirs" as the beneficiaries of the death benefits, aggregating \$1,000:

Held, (1) that the designation was valid; (2) that the phrase "legal heirs" means next of kin or relatives by blood, and excludes the widow; (3) that the designation once legally made cannot be revoked by a new designation made by the last will of the deceased member, and (4) that under the designation originally made the brother and only legal heir of the deceased was entitled to take the fund to the exclusion of the widow, and notwithstanding the will.

Trial Term, January, 1886.

TRIAL by the court without a jury.

Hassey Brothers and H. F. Lippold, for plaintiff.

D. S. Ritterband, for defendant.

McADAM, C. J.—Solomon W. Kaiser, the husband of the plaintiff, departed this life on the 28th day of September, 1884, being at the time a member in good standing of the "Mutual Relief Association of New York," a benevolent society incorporated under the laws of this state. The constitution of the society (art. 3) declares that the "object of the association shall be to pay a fund to the designated beneficiaries of its deceased members, and in other lawful ways to protect and care for their families." Article 8 provides that the death benefits shall be paid to the beneficiary designated by the deceased member, and if no designation is made, the fund is to go to the widow.

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Instead of omitting to make any designation, and allowing the fund to go to the widow by force of the article referred to, Mr. Kaiser filed a designation directing that the benefits be paid to his "legal heirs." This he had the right to do, even to the exclusion of his widow (*Durian agt. The Central Verein*, 7 *Daly*, 168).

The phrase "legal heirs," although generally a term of description, has a well defined meaning, and whether applied to real estate or personalty, it includes only next of kin or relatives by blood, and excludes the widow (*Tilman agt. Davis*, 95 *N. Y.*, 17). The designation required by a benefit society is sufficiently complied with by any form of words sufficient to make known the intention of the party (7 *Daly*, *supra*), hence the use of the words "legal heirs" was a proper mode of designating the beneficiary. Bequeathing the sum in question to another by will not brought to the knowledge of the relief association until after the testator's death does not operate as a new designation. The testator had no interest in the fund which could descend or upon which a will could operate, but simply a power of appointment which if not exercised before his death in the manner specified in the by-laws became inoperative (*Heltenberg agt. District No. 1, &c.*; 94 *N. Y.*, 580).

The testator certainly could not by will change the beneficiary named in a life insurance policy, for the contract was to pay the person named—no other—and the same principle applies with equal force to a relief society which contracts to pay to designated beneficiaries. They alone can claim the fund and enforce the contract. The plaintiff sued the relief association to recover the stipulated death benefits which amount to \$1,000, and on its application for interpleader, the fund was deposited in court, and Isidor Kaiser, the legal heir, who made claim to the fund, was substituted as defendant in the place and stead of the relief association.

The determination of the litigation is narrowed down to the single issue—which of the two rival claimants is entitled to—

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the fund; and this in turn involves the question—which of the rival claimants had a valid claim against the relief association. The application of the settled principles before referred to requires me to find that the defendant, the brother and only heir of the deceased (95 *N. Y., supra*), as the designated beneficiary, is entitled to the fund in court, to the exclusion of the widow.

Judgment accordingly, with costs.

SUPREME COURT.

MARY HOLLAND and others agt. FREDERICK SMYTH and another, executors, &c., of THOMAS GUNNING, deceased.

Will—Bequest for masses valid.

A testamentary provision for masses for the benefit of the testator's soul is valid and should be upheld.

Kings County, Trial Term, January, 1886.

E. H. Benn, for plaintiff.

David McClure, for defendant Smyth.

CULLEN, *J.*—In this case the testator has given his residuary estate to his executors to be expended for masses for the benefit of his soul. In *Gilman agt. McArdle* (99 *N. Y.*), a gift *inter vivos* for that purpose was held a valid contract. It is claimed, probably correctly, that the case cited is not decisive of the one at bar, because here is a testamentary disposition instead of a contract. The objection urged to this as a testamentary disposition is that it fails as a trust for the want of a living beneficiary. Such an objection does not apply to a charity under the English law, and it seems settled by authority that such part of the English common law of charitable uses became the law of this state (*Williams agt. Williams*, 8 *N. Y.*, 527; *Owens agt.*

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Missionary Society, 14 *id.*, 298; *Beekman agt. Bousor*, 23 *id.*, 298). As a rule, all pious uses were within the law of charities (*Perry on Trusts*, sec. 78). But it is contended that this use is an exception, because it was dictated by desire for personal advantage to the testator, and some authorities support this claim. The trial court so held in the case of *Gilman agt. McArdle*.

But granting that this bequest is not for a charitable use, I am still of opinion it must be upheld. Provisions for monuments and expenses of funerals are common in wills, and while in most cases they have been assumed to be good, rather than the question of their validity discussed, still, whenever the question has directly arisen they have been upheld. In *Bainbridge's Appeal* (97 *Penn.*, 482), the testator directed his whole residuary estate to be expended in a monument. It was held that the executor had a right to apply all the estate remaining in his hands for that purpose. In answer to the claim of the next of kin, the court say: "We will not consider the wisdom or folly of this disposition. He had a right to make it. He did make it. We can see no cause to set his will at naught or impair its force."

In *Delwiller agt. Hartman* (37 *N. J. Equity*), testator directed his executors to erect a monument at a cost not exceeding \$50,000 nor less than \$40,000. It was held that the trust to buy a burial plot and erect the monument was valid. In the opinion delivered in the case, the chancellor says: "To hold otherwise would be to deny the right of the testator to dispose of his estate. It is conceded that a testator may make provision by his will for the erection of a memorial to himself at his grave, but his right to provide for one so expensive as that which this testator contemplated, and for which he has provided in his will, is denied. It is obvious that if the right to dispose of any part of his estate exists, as it undoubtedly does, this court cannot limit its exercise."

In the case of *Mellick agt. Guardians of the Asylum* (1 *Jacobs*, 180), the master of the rolls held the same doctrine.

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In *Cole's Executors agt. Higgs* (27 *N. J. Equity*, 808) it was held that the executors could recover of the devisee a legacy to erect a fence around the burial lot of the testator's mother, where the legacy had been charged upon the land.

In *Emmons agt. Hickman* (12 *Hun*, 425), justice GILBERT says: "It was competent for the testator to direct that the whole estate be spent for funeral services and a monument." It must be admitted, however, that this remark was obiter.

In *The Matter of the accounting of Frazer* (92 *N. Y.*, 239), the will directed the executors to expend a sum not exceeding \$2,000 in the burial lot of the testator's father-in-law. Question having arisen as to the propriety of certain expenditures under this provision, the expenditures were held proper, the validity of the direction itself passing unchallenged.

Bequests of this character for funerals or monuments cannot be sustained as charities, though some remarks of Mr. Perry, in his work on *Trusts* (sec. 706), would support such a claim. I think the learned author has fallen into an error. The crucial test whether legacies are charitable is the application of the law of mortmain and the rule against perpetuities. In every case within my research in which the question has arisen, legacies for the erection of monuments have been held not within the mortmain act, and hence valid when charged on land, and legacies for the continuous repair of monuments void as creating perpetuities. In all the cases the decision has been rested squarely on the ground that the purpose was not a charity. So in the case of *Detwiller agt. Hartman*, though the trust for the erection of the monument was held good, the trust for its repair was held bad.

It follows that there is a certain class of testamentary dispositions, the object of which is solely the benefit, real or supposed, of the testator, or the gratification of his desires, which, if trusts, are not charities, nor do they have any beneficiary, yet nevertheless are unquestionably valid. The precise legal doctrine on which they rest, the cases do not state. It may be that they are not to be treated as trusts, but as conditional lega-

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cies, so that if the executors or donee fail or refuse to carry out the objects for which the legacies are given, the legacies would revert to the estate. However, that may be, in this case the donee is discharging the conditions imposed by the testator, and the question does not arise.

I think a provision for masses for the benefit of the testator's soul is exactly akin to a provision for his funeral or monument, while decent burial is given by the law out of even an insolvent's estate. I think the monument is no more an adjunct or concomitant of burial than the masses. One testator may direct his whole estate expended in the pomp of a funeral pageant, a second in a monument to commemorate his name, a third in religious services for the benefit of his soul. It is a matter of taste and of religious faith. I think all the directions are of the same general character and equally good in law.

The conclusion here reached is supported by the able opinion of the late surrogate of this county in *The Matter of Hagemeyer's Will* (12 Abb. [N. C.], 432).

Judgment for defendant.

SUPREME COURT.

HENRY A. GADSDEN, respondent, agt. EDWARD H. WOODWARD,
appellant.

DOUGLASS DIXON, respondent, agt. EDWARD H. WOODWARD,
appellant.

Code of Civil Procedure, sections 523, 837 and 1214—Corporations—Action against trustee to recover corporate debts as penalty for failure to file annual report—Defendant cannot serve an unverified answer to a verified complaint—Defendant not privileged as a witness under section 837 of Code of Civil Procedure—Judgment cannot be entered on application to the clerk—Action ex delicto not ex contractu.

A complaint in an action against a trustee to charge him with a corporate

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debt by reason of the failure to file an annual report, when verified requires a verified answer.

In such an action the defendant would be obliged to testify, if called as a witness, against himself and is not privileged under section 837 of the Code; disproving *Hughan* agt. *Woodward* (2 *Hov. Pr.* [N. 8], 127.)

The action is not one specified in 1214 of the Code, and judgment cannot be entered by application to the clerk, but an application must be made to the court.

Where a defendant is served with a verified summons and complaint in an action to charge him as a trustee of a corporation with a corporate debt, by reason of the failure of the corporation to file an annual report, he must serve a verified answer and the plaintiff will not be compelled to receive an unverified answer.

Where the plaintiff, in such an action, upon the service of an unverified answer to a verified complaint, returned the answer with notice that the plaintiff elected to treat it as a nullity and thereupon entered judgment without application to the court. *Held*, that the order of the special term refusing to vacate such a judgment was erroneous, and that the judgment should be vacated because the action was not an action on contract within the meaning of section 1214 of the Code.

First Department, General Term, October, 1885.

Before DAVIS, P. J., BRADY and DANIELS, J. J.

APPEALS from two orders of judge LAWRENCE.

First. Denying the defendant's motion to compel the plaintiff to receive the defendant's unverified answer.

Second. Denying defendant's motion to vacate a judgment entered by the plaintiff upon application to the clerk, without notice to the defendants, required by section 1219 of the Code.

James B. Dill (Dill & Chandler), attorneys for appellant.

First. The defendant was entitled to serve an unverified answer because under section 523 of the Code, the verification may be omitted "where a party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleadings." In an action such as this, the defendant is privileged from testifying as a witness concerning

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the allegations of the complaint, because under section 837 of the Code a party is excused from giving an answer which will tend "to expose him to a penalty or forfeiture (*Hughen agt. Woodward*, 2 *How. Pr.* [N. S.], 127).

Second. A complete answer to the question, as to whether this action is a penalty or forfeiture within the meaning of section 837 of the Code, is to say that these exact words "penalty or forfeiture," are used elsewhere in the Code, and have been passed upon by the Court of Appeals, as follows: Section 383 prescribes that an action for "a penalty or forfeiture must be brought within three years" (*Merchants' Bank agt. Bliss*, 35 N. Y., 412; *Stokes agt. Stickney*, 96 *id.*, 326, and cases cited). Section 983 prescribes that an action "to recover penalty or forfeiture must be brought within the county where the cause of action arose," *Veeder agt. Baker* (83 N. Y., 156) holding that an action such as this, is an action to recover a penalty or forfeiture. Section 1897 of the Code provides that, in an action "to recover a penalty or forfeiture, an indorsement must be made upon the summons" (*Vernon agt. Palmer*, 48 *Supr. Ct.*, 231), is to the effect that an action such as this is an action within this section of the Code. The judgments entered are void, because section 1214 is limited to actions on contract. This is not an action on contract, but is to recover a penalty or forfeiture. See cases above cited, *Halsted agt. Dodge* (51 *Supr. Ct.*, 179), *Wilds agt. Suydam* (64 N. Y., 173), holding that by uniting an action against a trustee with an action on contract, renders the complaint demurrable (*Victoria W. P. & F. M. Co. agt. Beecher*, 97 N. Y., 651). The defendant was entitled to notice of assessment by the clerk (*Code*, sec. 1219).

Wilnot & Page, for the respondent.

I. The complaint having been verified, the answer served must also be verified, and the denial of the motion to compel the receipt of the unverified answer was proper under the circumstances. "Where a pleading is verified, each subsequent

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pleading, except a demurrer, or the general answer of an infant by his guardian *ad litem*, must also be verified. But the verification may be omitted in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying as a witness, concerning an allegation or denial contained in the pleading. A pleading cannot be used in a criminal prosecution against the party, as proof of a fact admitted or alleged therein" (sec. 523, *Code of Civil Pro.*). Under this section the defendant is *not* privileged, either as a witness or as to verifying his answer. The failure of the trustees to file the annual report was not a misdemeanor, and no fine could be imposed by law. The liability created by the statute is in the nature of liquidated damages, chargeable against the trustees upon their failure to file the annual report, and the measure of that liability is based upon the accrued indebtedness of the corporation. Even though fraud had been alleged, the answer must be verified (sec. 529, *Code Civ. Pro.*).

II. The answer sought to be interposed, sets up the statute of limitations. This defense does not involve the merits, and the answer must be verified or it may be disregarded and treated as a nullity. Dilatory defenses must be verified (sec. 513, *Code of Civ. Pro.*; *Fredericks agt. Taylor*, 52 N. Y., 596).

III. The judgment was regularly taken and entered. No application to the court was necessary under the circumstances (secs. 420, 1212, 1213 of *Civil Pro.*). The unverified answer was at once returned upon receipt with a notice electing to treat it as a nullity (sec. 528, *Code Civ. Pro.*). Judgment was not entered until after the entry of the order denying defendant's motion to compel plaintiff to accept the unverified answer. The action is brought for the recovery of a debt, and not to recover a penalty. No penalty attaches to any default of the trustees, without there is an existing debt against the corporation. The remedy is cotemporaneous and concurrent against the defaulting trustees and corporation, and can only be resorted to for the collection of a debt due from the corporation. A recovery had against the corporation, the liability ceases—or if

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the recovery is had against the defaulting trustees, the creditor cannot recover as against the corporation, but the defaulting trustees may be subrogated, and may compel contribution and payment from their co-defaulting trustees. The trustees, by their default, become sureties for the accrued debts of the corporation (*Jones agt. Barlow*, 62 *N. Y.*, 202, 205). The debt demand by the plaintiff has accrued. It is capable of being liquidated and an assessment made by the clerk (*sec. 420 of Code of Civ. Pro.*). The defendant stands upon the record, and is, in fact, in default, and thus must be taken to have admitted both the right of recovery and its amount (*Bullard agt. Sherwood*, 85 *N. Y.*, 253, 255).

IV. The judgment should not be disturbed even though an application to the court should be held to be proper. There is no pretense that the present judgment would have been more favorable to defendant, Woodward, or for a smaller amount, if application had been made to the court instead of the clerk. No substantial right has been, or can be, affected, and the error or defect, if any, must be disregarded (*sec. 723, Code of Civ. Pro.*). This was so under the old Code (*sec. 176; Whitehead agt. Pecare*, 6 *How.*, 35). Neglect to apply to the court for judgment, when necessary, is a mere irregularity (*Bissell agt. N. Y. C. H. & Co.*, 67 *Barb.*, 385). To set aside an irregular judgment, the moving party must show that he is prejudiced or injured by it (*Green agt. Warren*, 14 *Hun.*, 434). In this case the court very properly says: "If, however, it should be conceded that the judgment of the plaintiff was irregularly entered, it does not follow that it should be set aside," and further: "No mere trivial irregularity should be permitted to deprive a party of a lien fairly, but irregularly, it may be, acquired" (*citing case of Bank of Buffalo agt. Cowry*, 22 *Wend.*, 630; 4 *Wait's Pr.*, 632, and *cases cited; Bacon agt. Copsy*, 7 *N. Y.*, 195. *Union Bank agt. Bliss*, 36 *id.*, 631; *Mitchell agt. Van Buren*, 27 *id.*, 800; *Hatch agt. Central National Bank*, 78 *id.*, 487-490).

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BRADY, J.—This action was brought to enforce a liability incurred as alleged by the defendants and his co-trustees, in consequence of their failure to file an annual report as trustees of the Pyrolusite Manganese Company. The summons was personally served on the appellant defendant within the state, and the complaint was duly verified. The defendants answered separately, but the defendant Woodward served an unverified answer, which was returned the day it was served, with a notice electing to treat it as a nullity pursuant to section 528 of the Code of Civil Procedure. On the 13th of May, 1885, the appellant made a motion to compel the plaintiff to receive the unverified answer, which motion was denied and an order entered. Judgment was subsequently entered as on a default for want of an answer in an action upon contract, and therefore upon application to the clerk only.

Thereafter the defendant moved to set aside the judgment as irregularly entered, which motion was denied. This appeal involves the propriety of both orders denying the motions mentioned. The appellant insists, this being an action to recover a penalty, that he is not bound by the provisions of the Code to answer under oath the allegations in the complaint. And this view seems to be predicated of a number of decisions declaring, as they certainly do, the action to be in its nature *ex delicto* and in its character penal. It was so pronounced in the case of the *Merchant's Bank* agt. *Bliss* (35 N. Y., 412), and since that decision, as observed by chief judge RUGER, in *Stokes* agt. *Stickney* (96 N. Y., 326), the subject of actions under the section of the statute of 1848 which create the liabilities of trustees upon facts alleged in this action, "has frequently been under the consideration of this court, with the uniform conclusion that the actions therein provided for are penal in character and are not in any respect based upon the theory of affording compensation to the injured party for damages sustained by reason of the omission complained of." The logical effect of these decisions which he states, is to classify such actions under those

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usually designated as actions *ex delicto* and which at common law were extinguished by the death of the *tort feasor*.

The Code, however, by section 523, provides that where a pleading is verified, each subsequent pleading, except a demurrer, must also be verified. And further, that the verification may be omitted in the action where the party would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading, and section 837 declares that a witness shall not be excused from answering a relevant question on the ground only that the answer may tend to establish the fact that he owes a debtor, or is otherwise subject to a civil action; but provides that this does not require a witness to give an answer which would tend to accuse himself of a crime or misdemeanor, or expose him to a penalty or forfeiture. Nor does it vary any other rule respecting the examination of a witness. The theory of the appellant, therefore, is that this is an action *ex delicto* for a penalty, and that as he could not be required to appear as a witness and answer any question which would expose him to a judgment for a penalty, he is not bound to verify his answer.

It will doubtless have been observed that section 837, to which reference has been made, expressly declares that the witness shall not be excused from answering any relevant question on the ground only that the answer may tend to establish the fact that he owes a debt or is otherwise subject to a civil suit. It is true that the statute of 1848, under which this action was brought subjects a trustee who fails to comply with some of the provisions of that statute to a penalty which in this particular instance is the payment to the creditor of a debt due from the corporation. In other words, it extends the liability of the corporation to the trustee and imposes upon him the obligation to pay the indebtedness. It is not, however, a penalty in the sense of a forfeiture, as in the case of *Henry agt. Salina Bank* (1 N. Y. 83), and upon which the appellant herein relies. There it appears that if Chapman, the witness, had committed the act complained of, he forfeited not only

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twice the amount of the loan which he made on behalf of the bank with which he was connected, but likewise forfeited the debt itself. Hence the word penalty or forfeiture, used in section 837, would seem to be used in the same sense. In other words, the penalty as to which the witness may be excused from testifying necessarily must involve a forfeiture, as illustrated by the case to which reference has just been made. And this must be a forfeiture as contradistinguished from the liability to pay a debt. It must be characterized by the loss of some right, privilege, estate, honor, office or effects by an offense, crime, breach of condition or other act.

It is true that the obligation imposed to pay the debt is a *quasi* forfeiture of a man's property, but that the legislature intended to make a distinction between it and such a penalty as mentioned is very clear, for the reason which has already appeared, namely, an express declaration that the witness should not be excused from answering where the answer would tend *only* to establish that he owed a debt or was otherwise subjected to a civil suit. And this view is confirmed by the definition, *first*, of a criminal action and, *secondly*, of a civil action. A criminal action is one prosecuted by the people of the state against a person charged with a public offense for the punishment thereof. Every other action is a civil action (*see Bliss' Annotated Code*, 1877, p. 1003).

We have been referred on this subject to the case of *Clapper* agt. *Fitzpatrick* (8 *How.*, 314), decided in 1848. That, however, was an action of assault and battery and the section under which it was decided was quite different from that now under consideration, as will be seen by an examination of that case.

We are also referred to the case of *Hughmen* agt. *Woodward* (*August No.*, 1885, *How. Pr.*, 127), in which the general term of the city court held that in an action such as this a defendant was privileged from answering any question concerning the facts alleged in the complaint and could not be compelled to answer upon an examination before trial any question which

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would support the claim of the defendants either against him or his co-defendants.

The learned justice who wrote the opinion in that case, regarded the action, and properly, as penal in its character, and held that under the provisions of section 837, to which reference has been made herein, and the case of *Henry agt. Salina Bank (supra)*, a party was not required to be a witness.

We cannot follow that case, however, because we think that the distinction between actions purely penal involving forfeiture, and actions in the nature of a forfeit which would merely impose the payment of a debt, was not considered.

For these reasons, it is thought that the motion to compel the plaintiff to receive an unverified answer was properly denied and that the order appealed from should therefore be sustained.

A different result, however, has been arrived at with regard to the motion to set aside the judgment, upon the ground that it was irregularly obtained. It appears that an affidavit of merits had been served, and, as we have already learned, an answer also; but the latter was returned because it was not verified. The action is clearly not *ex contractu*, as appears from the cases already cited, and to which may be added *Macomb agt. N. Y. C. and H. R. R. Co.* (59 N. Y., 176), *Wild agt. Suydam* (64 N. Y., 173), *Easterly agt. Barbour* (85 N. Y., 262). And not being an action *ex contractu*, the clerk was not authorized, under section 1212 of the Code of Civil Procedure, to enter the judgment, the complaint not setting forth one or more causes of action embraced within, and contemplated by, section 420 of the Code.

It is contended, however, by the respondent that, assuming the judgment to have been irregularly entered, the defendant is not prejudiced, and, therefore, it should not be set aside, inasmuch as the appellant cannot set up any meritorious defense. The response to this is, that the answer is not before us, and that an affidavit of merits is upon file, which is regarded as destructive of the contention mentioned.

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For these reasons it is thought that the order appealed from, in reference to the unverified answer, should be affirmed, and the order in regard to the vacation of the judgment should be reversed without costs of either party of this appeal. These conclusions each apply to three other cases presented at the same time this appeal was heard, and involving the question discussed and disposed of.

Ordered accordingly.

DANIELS and DAVIS, JJ., concur.

SUPREME COURT.

BRADLEY agt. FANSHAWE

Complaint—Sufficiency of, in an action for wrongful conversion—Code of Civil Procedure, section 1721.

In an action to recover damages for the wrongful conversion of certain bonds, a complaint alleging "that at a certain time this plaintiff, at request of defendant, delivered said bonds to defendant, as his agent, for the purpose and upon the agreement that the defendant would sell the same at a price satisfactory to the plaintiff, the proceeds of sale, when due, to be immediately delivered to this plaintiff, and, if not sold, returned upon demand to this plaintiff; that, prior to the commencement of this action, plaintiff duly demanded from the defendant the return of said bonds, but the defendant has refused to return said bonds, or any of them, to plaintiff, but has wrongfully converted the same to his own use to the damage of the plaintiff, &c.:"

Held, that the complaint contains every fact necessary to give to the plaintiff his right to relief. There is a sufficient allegation, that there has been a proper demand, and a refusal on the part of the defendant:

Held, further, that a wrongful conversion by the defendant of the property is sufficiently alleged:

Held, also, that the allegation that the bonds were duly demanded from the defendant is, in effect, a statement of the fact that the plaintiff, in accordance with the contract, duly demanded the return of the bonds. And this allegation also negatives any idea that there had been a sale of the bonds by the defendant.

Special Term, December, 1885.

Bradley agt. Fanshawe.

LAWRENCE, J.—Section 1721 of the Code of Civil Procedure relates to an action for the recovery of a chattel, or in other words to an action of replevin. This is not an action for the recovery of chattels, but an action to recover damages for the wrongful conversion of the bonds mentioned in the complaint, or in other words an action of trover.

I am therefore of the opinion that the complaint in this case states facts sufficient to constitute a cause of action. The allegation in the complaint is "that in the month of September, 1884, this plaintiff at request of defendant delivered said bonds to defendant as his agent, for the purpose and upon the agreement that the defendant would sell the same at a price satisfactory to the plaintiff, the proceeds of sale when due to be immediately delivered to this plaintiff, and if not sold returned upon demand to this plaintiff. That prior to the commencement of this action plaintiff duly demanded from the defendant the return of said bonds, but the defendant has refused to return said bonds or any of them to plaintiff, but has wrongfully converted the same to his own use to the damage of the plaintiff in the sum of \$1,750."

It seems to me that every fact which is necessary to give to the plaintiff the right to relief is contained in the paragraphs of the complaint above quoted. The goods, if not sold, were to be returned upon demand to this plaintiff. The allegation is that, prior to the commencement of the action, the plaintiff duly demanded from the defendant the return of said bonds, but that the defendant has refused, &c.

Surely this is a sufficient allegation that there has been a proper demand and a refusal on the part of the defendant (*see Allen agt. Patterson*, 3 *Selden*, 476). After alleging that the defendant has refused to return said bonds or any of them to the plaintiff, it is further averred that he has wrongfully converted the same to his own use, &c.

It seems to me that this allegation sufficiently states a wrongful conversion by the defendant of the property. If not sold, the bonds were to be returned upon demand to the plaintiff. I

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regard the allegation that the bonds were duly demanded from the defendant as in effect a statement of the fact that the plaintiff, in accordance with the contract, duly demanded the return of the bonds (*see Bostwick agt. Dry Goods Bank*, 67 Barb., 449; *Allen agt. Patterson*, 3 Selden, 476; *Decker agt. Matthews*, 2 Kernan, 313). This allegation also, in my opinion, negatives, as is contended by the counsel for the plaintiff, any idea that there had been a sale of the bonds by the defendant.

There must be judgment for the plaintiff upon the demurrer, with leave to the defendant to answer over on payment of costs.

SUPREME COURT.

CALEB WILLIAM LORING, executor, &c., agt. AMOS BINNEY
and another.

Summons—Service by publication—Sufficiency of service—Code of Civil Procedure, sections 442, 443-723.

Where, in proceedings for the service of the summons in an action upon parties without the state by publication, the requirements of the statute were complied with except that when a copy of the summons and complaint was mailed to each non-resident named in the order, the notice accompanying the copy summons so mailed, instead of being the notice that was published with the summons, stating that the summons was served by publication, pursuant to an order of the judge who made it, was a notice that the summons was served without the state of New York, pursuant to the order of the judge, and except that the notice which was published failed to be directed to the defendants alone who were to be served with the summons by publication:

Held, that the failure to comply with the requirements of the Code in these respects did not so far invalidate the service as to deprive the court of jurisdiction over these absent defendants.

First Department, General Term, December, 1885.

Before DAVIS, P. J., BRADY and DANIELS, J. J.

Loring agt. Binney.

APPEAL by James M. Jackson from an order denying a motion made in his behalf to be discharged from his obligation as purchaser of real estate sold under the judgment in this action.

William Man, for appellant.

William Watson and *George W. Van Slyck*, for respondents.

DANIELS, J.—The sale was made under a judgment obtained for the construction of the will of the testatrix, and directing the sale of the premises known as 17 Madison avenue. The purchaser refused to receive and accept the title because of a failure to comply with the requirements of the Code prescribing the proceedings to be taken for the service of the summons upon certain infant and adult defendants residing out of this state. The infants were each of them over the age of fourteen years, and were liable to be served with the summons as non-resident defendants by complying with the directions contained in the Code on this subject. Upon an affidavit reasonably sufficient for that purpose, an order of publication was made in the usual form directing the service of the summons to be made upon the defendants residing in other states by publication, and by mailing a copy of the summons and complaint to each of said defendants.

In compliance with this order, a copy of the summons and complaint, and of the order of publication, was mailed to each non-resident defendant at his or her place of residence, as that was directed by the order, and the summons itself, with a notice attached thereto, was published in the newspapers designated in the order. But instead of the notice which was published with the summons, stating that the summons was served by publication, pursuant to an order of the judge who made it, as that was required by section 442 of the Code, the notice directed by section 443 was published, stating that the summons was served

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without the state of New York, pursuant to an order of the judge. The notice which was published also failed to be directed to the defendants alone, who were to be served with the summons by publication. And the point now to be determined is, whether the failure to comply with the requirements of the Code in these respects, so far invalidated the service as to deprive the court of jurisdiction over these absent defendants.

Applications were made on behalf of the infants for the appointment of a guardian *ad litem*, and such a guardian was appointed for them, who appeared in their behalf in the action. But it is not important that any particular stress should be placed upon this fact, for the reason that the adult defendants residing out of the state, and also served in this manner, did not appear in the action.

The disposition of the case must, therefore, depend upon the question whether jurisdiction was acquired over these defendants residing in other states by the proceedings, as they appear to have been taken.

As the summons was served by publication, and not by the delivery of a copy of it to the respective defendants out of the state, they each received by the papers, which were mailed to them, all that was required should be sent to them.

The practice to this extent is controlled and regulated by section 440 of the Code, which, by its effect, directs that the copies of the summons, complaint and order should be mailed to the defendants, to be served at the place or places where they would probably receive matter transmitted through the post-office. This section was fully complied with, and as the places to which the copy summons, complaint and order were mailed appear to be the places of residence of the respective defendants to whom they were sent by mail, it is to be presumed that they received these copies, and in that manner acquired all the information concerning the action, and the authority to serve the summons by publication which the law provided they should have.

They were in this manner informed of the object and design

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of the action, and summoned to appear and present their defense, by way of answer, or that, in default thereof, judgment would be taken against them for the relief demanded in the complaint, and the authority for making this service was disclosed by the copy of the order accompanying the other papers.

The same result was also attained by the publication, which was in fact made by the summons itself, and neither of the defendants, if reliance was placed upon the form of the publication, could have been misled to his or her prejudice by the statement in the notice that the summons was served without the state of New York, instead of its being stated that it was served by publication. For the residue of the notice was required to be and was identical in both classes of cases, and that contained the information that the summons was served pursuant to an order of a judge of the court, as that notice was required to be given by each of these sections of the Code. Whether, therefore, the notice stated that the summons was served without the state of New York or by publication was not important for the purpose designed to be accomplished by the notice required in the one case to be published or in the other to be served upon the defendants. For by either form of notice the essential information would be given that service of the summons was made under the authority of an order of a judge of this court, and the information was further given when that order was made, and where it could be found. The substantial objects intended to be accomplished by the notice were accordingly secured, even if the defendants relied upon the publication itself, for it clearly appeared from it that the publication was made under and by virtue of the authority vested in the judges of the court over this subject. And as that information was clearly supplied, it could not be important, as a matter of jurisdiction, whether the notice stated that the summons was served by publication or without the state of New York, pursuant to the order of the judge. The summons itself was the important document. When that was served in the manner directed by the Code, whether it was by publication or by

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service personally upon the defendant without the state, the court acquired jurisdiction over the person of the defendant served. This has been provided for by section 416 of the Code declaring that a civil action is commenced by the service of the summons, and as the suit was commenced by that service the failure literally to comply with the directions concerning the form of the notice which was to be published, but not in fact served, or required to be served, upon either of the defendants, was no more than an irregularity which would not deprive the court of the jurisdiction obtained by the service of the summons in compliance with the directions of the order for its publication.

This mode of service included not only the formal publication of the summons, but also the mailing of a copy of the summons and complaint, and of the order of publication, to each one of these defendants. When that was done and the period of publication had elapsed the summons was completely served in the action, and the court could afterwards rightfully proceed to adjudicate upon the rights of the parties, notwithstanding this defect in the form of the notice which was published.

The omission of the names of the defendants to be served by publication in the notice was a defect still more formal, and could by no possibility have misled either of the defendants, for the order of publication itself contained these names, and fully supplied all the information which the addition of the names to the notice would have secured.

Upon this general subject the Code has further provided, by section 723, that "In every stage of the action the court must disregard an error or defect in the pleadings or other proceedings which does not affect the substantial rights of the adverse party."

These were clearly errors or defects of this description, for the omission of the names of the defendants who were to be served by publication from the notice, and the statement in it that the defendants were served with the summons without the state of New York, in place of the statement that they were served by publication, could by no possibility affect any substantial rights

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of either of these defendants. For, aside from these defects in the notice, they were supplied with complete information, either by the summons and notices as they were published or by the copies of the papers which were mailed to them, or by both, that an action was being commenced in which judgment would be obtained against them by default if they failed to appear and answer, and that the proceedings for commencing it in this manner were authorized and sanctioned by an order of a judge of the court, as that had been provided for by the law of the state. And that was all that it was substantially important for their protection that either of the defendants should know concerning the proceedings that were carried on. They had provided them with the opportunity of appearing and litigating the case, and informed them of the consequences of their failure to do that, and of the time within which their appearance for the purpose of contesting the action was required to be made. Cases involving similar points of practice have already been presented to the courts, where at least as liberal a construction of the act as that which has been indicated, has been sanctioned (*McCully agt. Heller*, 66 How., 468; *Thistle agt. Thistle*, *id.*, 472; *Orvis agt. Goldschmidt*, 2 N. Y. Civil Procedure Rep., 314; *McCoon agt. N. Y. Cent., &c.*, 50 N. Y., 176, 178-9; *Gibbon agt. Frill*, 93 *id.*, 93). Both by the construction plainly required to be given to these sections of the Code and by force of these authorities, the proceedings taken in this action to acquire jurisdiction over the absent defendants require to be sustained. The purchaser, therefore, will obtain a valid title to the property sold to him under the proceedings in the action, and he should be required, as he was by the order from which the appeal has been taken, to complete his purchase. But while that order should be affirmed, it should be without costs, for the reason that greater care should have been observed in the proceedings to comply literally with what the Code has prescribed as the manner in which they should be taken.

DAVIS, P. J., and BRADY, J., concurred.

Lawrence agt. Burrell.

NEW YORK CITY COURT.

LAWRENCE, appellant, agt. BURRELL, respondent.

Landlord and tenant—*Facts which constitute a constructive eviction, and justified a tenant's abandonment of premises.*

In an action against the tenant of rooms in an apartment house, for rent, it appeared that the steam heat agreed by the landlord to be supplied was inadequate; that additional heat became essential to a proper enjoyment of the premises; that the flues and chimneys were defective or improperly constructed; that her apartments were often filled with dense smoke, and that the elevator service was inefficient:

Held, that these grievances were an obstruction to the beneficial enjoyment of the premises, constituting a constructive eviction, and justified the tenant's abandonment.

General Term, January, 1886.

Before HAWES, HALL and BROWNE, JJ.

APPEAL from a judgment of the defendant, entered upon a verdict, and from an order denying a motion for a new trial.

George W. Stephens, for appellant.

Ira D. Warren, for respondent.

BROWNE, J.—The question arising upon this appeal is, whether the facts urged by the defendant in her exoneration from liability for rent under the terms of the lease, in evidence, constitute a constructive eviction, and justified her in abandoning the premises.

A definition of eviction, well applied to the case at bar, is found in *McAdam's Landlord and Tenant* (at p. 478), where it is said, that "an eviction is where there has been an obstruction to the beneficial enjoyment of the premises, and a diminution of the consideration of the contract, by the acts of the landlord, or

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with his permission, or by paramount title, although these acts do not amount to a physical eviction, if they are so illegal and monstrous as to be equivalent to it."

The defendant established on the trial that the heating apparatus in the premises occupied by her, and in fact throughout the entire building, was inadequate for the purposes of supplying sufficient warmth to the inmates; that it became necessary in addition to build grate fires to heat the rooms, but that the flues and chimneys were defective or so constructed that they reversed the laws of nature, and instead of carrying the smoke and gases from the grate fires skyward to commingle with the outer atmosphere, caused them to descend into the apartments occupied by the defendant; that her rooms were frequently filled with smoke not only from her own fires, but from those maintained by other tenants in the house; that by reason of the density of the smoke it was sometimes found impossible to distinguish objects across the room, and often in the coldest and most inclement weather it became necessary to throw open the windows to permit the smoke to leave the rooms, rendering her occupancy very trying, an annoyance and a nuisance.

It was also contended by the defendant that the elevator service was inefficient, and that she was frequently deprived of the use of the elevator in carrying her to and from her apartments, on the fourth floor of the building.

The questions were litigated between the parties, and the facts submitted to the jury, and their finding in favor of the defendant affirmatively established the facts that the steam heat agreed by the landlord to be supplied was inadequate; that additional heat became essential to a proper enjoyment of the premises; that the flues and chimneys were defective or improperly constructed; that her apartments were often filled with dense smoke, as she contended, and that the elevator service was inefficient. All these questions were properly presented to the jury as questions of fact, and their finding in defendant's favor is conclusive as to them.

We are of opinion from an examination of the evidence that

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the jury could not well have found otherwise, as the proof was ample.

The question that remains is whether these grievances were an obstruction to the beneficial enjoyment of the premises. We think they were. Apartment houses, represented to contain upon one floor all the conveniences of the usual and ordinary dwelling houses, are assumed to be constructed in a manner calculated to conduce to the comfort and enjoyment of the inmates in the same manner as the more commodious dwelling houses, and the existence of any such unlooked for discomforts as shown to have existed here, seriously interfering with and affecting the tenant's beneficial enjoyment of the demised premises, would justify the tenant's abandonment and amount to a constructive eviction.

A careful examination of the record discloses no error committed in the reception or rejection of evidence warranting interference with the verdict, nor do we find any objectional matter in the learned judge's charge to the jury, which on the whole we deem as favorable to the plaintiff as circumstances permitted.

Judgment affirmed, with costs to respondent.

HALL and HAWES, JJ., concurred.

SUPREME COURT.

CLEGG agt. CRAMER *et al.*

Corporation — Complaint — In actions by or against corporations what must be averred — Code of Civil Procedure, section 1775.

In an action against certain corporations where it was averred that the plaintiff is informed and believes that the said last named defendants respectively, except the said defendant the New York Newspaper Union were and are foreign corporations, companies or associations, &c., but did not state under the laws of what state, country or government the said defendant was created. On demurrer;

Held, that the complaint was bad as not stating the facts required to be

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stated by section 1775 of the Code of Civil Procedure, and that as it appeared by the complaint that certain defendants were foreign corporations the objection could be taken by demurrer.

Special Term, January, 1886.

LAWRENCE, J.—Section 1775 of the Code provides that in an action brought by or against a corporation, the complaint must aver that the plaintiff or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and if the latter, the state, country or government by or under whose laws it was created. In this case it is averred that the plaintiff is informed and believes that the said last named defendants respectively, except the said defendant the New York Newspaper Union, were and are foreign corporations, companies or associations, &c. It is not stated under the laws of what state, country or government the said defendant was created. I am of the opinion that the demurrer is well taken. The language of the Code is imperative that the complaint must state, &c. Confessedly the complaint does not contain certain facts which the Code says must be stated. The precise point involved in this case was decided by J. F. DALY, J., in *Baker agt. Star Printing and Publishing Co.* (3 *Law Bul.*, 29). The case of *Fox agt. Erie Preserving Co.* (93 *N. Y.*, 57) is not in point, for the reason that the corporate character of the defendant had nothing to do with the cause of action, and the section of the Code invoked in this case was not the subject of consideration there. In the case of the *Irving National Bank agt. Corbett* (10 *Abb. [N. C.]*, 86), the demurrer was held not to be good, because it did not appear upon the face of the complaint that the plaintiff was a corporation, and the learned justice who decided that case expressly states in his opinion that it could not be assumed in support of the demurrer that the plaintiff was a corporation, and that if such was the fact the objection should have been taken by answer. In this case, as we have already seen, it does appear that the defendant,

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the Chicago Newspaper Union, is a foreign corporation, and the objection that the complaint does not state the other facts required to be stated by section 1775 of the Code can therefore be taken by demurrer. There must be judgment for the defendant upon the demurrer, with leave to the plaintiff to amend upon payment of costs.

CITY COURT OF NEW YORK.

JOSEPH S. COHN *et al.* agt. JOSEPH HUSSON.

Costs—What may be taxed on final judgment, when a party has been allowed to amend his pleading upon payment of certain costs.

When a party is allowed to amend his pleading upon payment of certain costs designated in the order as "costs," his adversary is not deprived of his right to tax a full bill of costs if successful.

The amount so paid was not intended to deprive either party of any costs which had accrued at the time of the entry of judgment.

General Term, December, 1885.

Before HAWES and HYATT, JJ.

A. Kling, for respondent.

J. Husson, for appellant.

HAWES, J.—We are of opinion that the judge below was authorized to order a retaxation, and that the order so made is appealable.

The only substantial question presented upon this appeal is, whether costs paid by a party as a condition of amending his answer, are again recoverable on the first taxation.

This is purely a question of construction which this court can determine for itself, and its decision is not subject for review (*Union Trust Co. agt. Whiton*, 78 N. Y., 491).

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The supreme court in the case of *Schmidt agt. Mackie* (9 *Week. Dig.*, 288) expressly holds that the plaintiff cannot recover in his bill of costs the costs which have been already paid, when, as in this case, an amended answer was allowed upon payment of costs up to that time, but it is stated in the opinion that, if the judge had imposed the payment of a sum of money equivalent to the costs, without designating it as such, doubtless the taxable costs might be recovered.

The superior court, however, in *Havemeyer agt. Havemeyer* (48 *Supr. Ct.*, 104) is equally explicit to the contrary, and holds that such order does not deprive the party of his contingent right to costs, nor is the order to be so construed, but rather as a compensation to the plaintiff for the amendment to be measured by the taxable costs to the time of its entry.

In both cases the application was for leave to amend the answer (as in this case), and in both (as in this) was leave granted on payment of costs to date.

The construction of the order must be determined by the intent and purpose of the judge in granting it, and it certainly seems to be a very close and technical construction to say arbitrarily that because he incidentally used the words costs in the order he intended that they should be the identical costs finally recoverable, and that if he had mentioned the exact sum without designating it as costs an entirely different purpose would have been inferable. The question really is whether the judge who granted the conditional order below intended to make a final disposition of the costs which might subsequently accrue and become payable, or whether he used the term merely as a measure of the compensation to which the opposing party would be entitled for the additional labor imposed by the favor granted.

It may be said, on the one hand, that the party receiving the costs upon the motion may never become entitled to them, as he may be unsuccessful, and in any event, even though he should be, yet their absolute payment in the possible contingencies of a fruitless execution would be justly deemed com-

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pensation in itself, although the successful attorney would, I think, consider the rate of insurance very high. This view of the case is involved in such uncertainty, and is subject to so many contingencies, that it furnishes to the court no criterion whatever of the amounts which should be imposed as compensation to the opposing party for the additional labor, and I think it cannot be deemed that the court intended the order to be so construed, and we are bound, I think, to construe it in the light of the purpose to be accomplished, and also of the intention of the court in allowing it.

I take it for granted when an amendment is allowed upon condition of payment of money, that the plain purpose of such payment is the compensation to the opposing party for the additional labor and trouble imposed upon him by reason of it, and that the payment of moneys has no other purpose. The court is presumed to know what would be a reasonable compensation in view of all the facts, and in its discretion orders such payment. Clearly it was not its purpose to make it payable at once rather than at some other time or to base its decision upon such uncertain conditions. Neither is it a fair inference that the court, in fixing the amount payable, had in mind a determination as to how the costs which should accrue at the close of the litigation should be finally disposed of, but that it was used in a mere general sense, and that the fair construction would seem to be that the court having fixed upon the amount of this compensation to be paid the opposing party, had used the term costs as a convenient measure of designating such compensation, and that it had no technical or different meaning.

The order should be affirmed, with costs.

HYATT, J., concurs.

Post *et al.* agt. Phelan *et al.*

SUPREME COURT.

ALFRED C. POST *et al.* agt. JOHN PHELAN *et al.*

Injunction—Trespass—Right of property owner to prevent, by injunction, trespassing on lands.

▲ property owner has the absolute right to prevent, by injunction, unauthorized trespassing upon his lands.

Special Term, January, 1886.

Lester W. Clark, for plaintiffs.

James A. Deering, for defendants.

DONOHUE, J.—The plaintiffs are the owners of certain lands north of One Hundred and Twenty-second street, and between Riverside drive and Claremont avenue. Their rights are in severalty, and not jointly, in the different pieces of land composing the one plot. Some years since, their agent made a joint contract with the defendant, Phelan, for the purpose of grading the lots, so that they would be even with the street, and to be in a condition for building purposes. For some years after the contract the defendant, Phelan, continued the grading of the property. It is immaterial, in this case, whether that contract was properly or diligently performed or not. In the course of the grading he used the land to be graded for the storage of the plant used in the grading. Some time during the performance of the contract a stable on one of the lots was sold to him, with the understanding that he should remove it. It is immaterial whether within a given time or before the grading should be done.

A few days before the funeral services of General Grant, whose tomb is in the immediate neighborhood of the lots in question, the defendant undertook to give some lease or right, whatever it may be, to another of the defendants, to use for

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different purposes the land in question. The lease or contract, whichever it may be, contained the provision subject to his contract with the plaintiffs. The plaintiffs, finding that the land was about to be used for the erection of stands and booths for the sale of refreshments, and feeling aggrieved at such use of their property, forbade its use for that purpose, and, notwithstanding such notice, the parties who intended to use the land continued their preparations for such use, and the injunction in this suit was obtained to restrain either the defendant or his grantees from an improper use of the property.

The first contention of the defendant is, that the action will not lie, because the defendant did not lease the property, but only whatever rights he had are subject to his lease.

As matter of fact he did get payment for the agreement which he made, and did give, or pretend to give, to the other defendants some right in the premises, and whether it was a lease or whatever it was, I think the plaintiffs have the right to treat him as being a party to the effort that was being made to use their land for the purposes complained of, and that the plaintiff has the right to appeal to the court for protection for such use.

The next defense set up substantially is, that there was some kind of tenancy on the part of the defendant, Phelan, and that no injunction will lie, but that proceedings must be taken to terminate his tenancy, either as one at will or at sufferance. This defense is wholly inconsistent with the first. There is no such relation of landlord and tenant between the parties as makes a tenancy of any kind whatever between the plaintiff and defendant. As well might a painter or plasterer or carpenter who undertakes to do work on a building, claim to be the tenant of the premises he so undertakes to repair. The contract of tenancy or the relation of tenant is one well understood, and does not arise in a contract for building, for grading, for carpenter's work, or for any other purpose. The relation of the parties must be that of landlord and tenant to entitle them to notice. A mere trespasser has no such rights.

People *ex rel.* Gillane agt. Haughton.

On the facts in the case, it seems to me demonstrated that, by and through the act of the defendant, and on the authority of the paper that he had executed, an effort was being made to use the property for purposes which the plaintiffs had the right to prevent, and that they are entitled to an injunction to prevent such use, and that the injunction originally obtained in this case should be made permanent, and the defendant, and those who may attempt to act for him, should be forbidden to make such use of the property.

Judgment for plaintiffs.

SUPREME COURT.

THE PEOPLE *ex rel.* THOMAS F. GILLANE agt. NICHOLAS HAUGHTON and others, constituting the Commissioners of the Board of Excise.

Excise law — Building used for public amusement — When no valid ground for refusing an excise license.

The fact that a building is used during some part of the time as a place of public amusement, affords of itself no valid ground for the refusal by the board of excise of an excise license.

New York Chambers, January, 1886.

MOTION for a mandamus.

Seward, Da Costa & Guthrie, for the motion.

Elliott Sandford, opposed.

VAN BRUNT, J.—There is no question but that the duties devolved upon the respondents by the excise laws are to some extent discretionary and judicial, and unless there is an abuse of that discretion the court cannot interfere with their action.

People *ex rel.* Gillane *agt.* Haughton.

The question, however, which is presented upon this application is whether the fact that in the building in which the relator proposes to carry on his business, at divers times entertainments are given, the character of which requires that the building should be licensed as a place of amusement.

The act relating to the licensing of places of amusement provides that it shall be unlawful to sell or furnish any liquors to any person in the auditorium or lobbies of any place of amusement or in any apartment connected therewith by any door, window or other aperture, and further provides that such selling or furnishing shall of itself vacate and annul and render void and of no effect any license which may have previously been obtained under the act regulating places of amusement.

An examination of this section shows that this restriction only applies to the hours during which the building is being used for public performances, and that the selling of liquors at all other times in such a building is no violation of the act, and that the excise license is in no way affected by a violation of the prohibition contained in the act, the only license affected being the public amusement license.

As, therefore, the sale of liquors in such a building in no way contravenes any statute during a large part of the time, and as the penalty for violation of the public amusement act affects the public amusement license only and in no way affects the excise license, it seems clear to me that the fact that a building is used during some part of the time as a place of public amusement affords of itself no valid ground for the refusal of an excise license.

If the licensee violates the public amusement act, that act fixes the penalty which in no way relates to the rights conferred by the excise license.

For these reasons I think that this motion should be granted.

People, &c., of New York agt. Excelsior Gas-light Company.

SUPREME COURT.

THE PEOPLE, &c., OF NEW YORK agt. THE EXCELSIOR GAS-LIGHT COMPANY.

Code of Civil Procedure, section 1785—When and by whom action to dissolve a corporation may be brought—Pleadings—Complaint—Answer—Sufficiency of allegation of insolvency.

In an action to dissolve a corporation brought under the provisions of section 1785 of the Code of Civil Procedure, is not material whether the defendant is a manufacturing, &c., corporation or not, as the section refers to all corporations created by or under the laws of the state.

When the dissolution is claimed by reason of the insolvency of the corporation and the complaint, in addition to an allegation that the defendant has been unable to meet its obligations, and that it has failed to pay a certain judgment, which the answer alleges has been paid, it alleges that the said defendant has not a dollar in its treasury, and is insolvent and has been for at least a year past, the answer not denying this allegation, but alleging payment of the judgment and averring that the said company has no liability to creditors by way of judgments unsatisfied;

Held, that, on the pleadings the plaintiff is entitled to judgment.

Insolvency means a general inability to answer in the course of business the liability existing and capable of being enforced. A corporation, like an individual, is insolvent when it is not able to pay its debts. It may be insolvent although no judgments have been recovered against it.

Special Term, January, 1886.

LAWRENCE, J.—This action is brought by the attorney-general to procure a dissolution of the defendant, *The Excelsior Gas-light Company*, and to have a receiver of its property, &c., appointed under the provision of article 3 of chapter 15 of the Code of Civil Procedure, sections 1785, 1786, *et seq.*

Two causes of action are stated in the complaint, the first being that the defendant has suspended its ordinary and lawful business for at least one year (*see sec. 1785, sub. 3*), and, the second, that said corporation has remained insolvent for at least one year.

People, &c., of New York agt. Excelsior Gas-light Company.

The answer, as to the first cause of action is, that the corporation is not authorized to manufacture illuminating gas, not being organized under the act to authorize the formation of gas-light companies, and that it has always been ready, excepting when stayed by injunction, to transact the business for which it was created, and that, except when so prevented, it has always transacted its lawful and ordinary business.

As to the second cause of action, it is alleged that a judgment referred to in the complaint was paid by contributions from several stockholders, to be repaid by sales of stock, and that the said company has no liabilities to creditors by way of judgments unsatisfied. It is also submitted in the answer that the defendant is not liable to be proceeded against as a corporation of manufacturing, mining, mechanical or chemical purposes.

Under section 1785, it is not material whether the defendant is a manufacturing, &c., corporation or not, inasmuch as the provisions of the article of the Code containing that section refer to all corporations created by or under the laws of this state.

The first subdivision of section 1785 expressly authorizes a judgment dissolving the corporation, where it has remained insolvent for at least one year.

In the complaint, in addition to the allegation that the defendant has been unable to meet its obligations, and has failed to pay the judgment which the answer alleges has been paid, it is alleged that the said defendant has not a dollar in its treasury, and is insolvent and has been so for at least a year past. The answer does not deny this allegation. It alleges payment of the judgment, and avers that the said company has no liability to creditors by way of judgments unsatisfied. A corporation may be insolvent against which no judgments have been recovered (*see Ferry agt. Bank of Central New York, 15 How., 341*).

A corporation, like an individual, is insolvent when it is not able to pay its debts. Insolvency means a general inability to

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answer, in the course of business, the liability existing and capable of being enforced (*Brouwer agt. Harbeck*, 9 N. Y., 594; *Marsh agt. Duncel*, 25 Hun, 167).

As there is, therefore, no denial of the general allegation of insolvency contained in the third paragraph of the second cause of action, that allegation must be deemed to be admitted, and it follows that the plaintiffs are entitled to judgment upon the pleadings.

I will, however, give leave to the defendant to amend its answer upon payment of the costs of the action.

SUPREME COURT.

JOHN ATWATER, appellant, agt. LYDIA A. LOWE, respondent.

Trespass—Responsibility of owner of cattle which have been leased for a term of years, for the trespass of such cattle while in the custody of the lessee.

The owner of cattle leased them, together with her farm, for a term of years, for a money rent. The cattle, when in the possession of the lessee, committed trespass upon a neighbor's lands. Action was brought for the damage done by the trespass against the owner of the cattle:

Held, that the owner was not liable for the damage done by the cattle while trespassing; that the owner, having lost the control and possession of the cattle, and not being able to gain possession or obtain control of the cattle, is not responsible for damage caused by them (*Van Slyck agt. Snell*, 6 Lans., 299, followed and distinguished).

Fifth Department, General Term, January, 1886.

THIS is an appeal from an order of the county court of Allegany county, granting a new trial.

The facts are sufficiently set forth in the opinion.

Richardson & Smith, for appellant. It is a well-established rule of the common law, that the owner of cattle is liable for any trespass committed by them, irrespective of any question

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of negligence (3 *Blk. Com.*, 211; *Ellis agt. Loftus Iron Co.*, 11 *Eng. Rep.*, 217). This rule has long been recognized and adopted in this state (19 *Johns.*, 384; 5 *Den.*, 255; 1 *N. Y.*, 575; 3 *Wend.*, 142; 18 *id.*, 213).

Alfred J. Hibbard, for respondent. The defendant, at the time of the trespass, being out of possession, and having lost the absolute and entire control of the cows and farm during the continuance of the lease, could not, in any manner, be held responsible for damage done by the cows while out of her possession (*Van Slyck agt. Snell*, 6 *Lans.*, 299).

HAIGHT, J.—This action was originally commenced in justice court and was retried in the county court, resulting in a verdict in favor of the plaintiff. Subsequently the defendant moved for a new trial upon the minutes of the court and the motion was granted; from this order the plaintiff appeals to this court. The action was brought by the plaintiff to recover damages alleged to have been sustained by reason of a trespass upon his premises by cattle owned by the defendant.

The defense was that the defendant had leased her farm, with the cattle thereon, to one Theron Foster, for the term of three years, and that Foster was in the possession of the farm and of the cattle as her tenant at the time of the alleged trespass.

The evidence given upon the trial established the defense. At the close of the evidence the defendant moved for a nonsuit; the motion was denied and exception taken. The case was then submitted to the jury and resulted in a verdict in favor of the plaintiff.

The only question presented upon this appeal is whether or not the owner of cattle is liable for the damages caused by them whilst trespassing upon the lands of others when the cattle are in the possession and under the control of a tenant.

This question was disposed of by the general term of the late fourth department in the case of *Van Slyck agt. Snell* (6 *Lans.*, 299). JOHNSON, J., in delivering the opinion of the court, says:

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"The county court was clearly right in holding that no cause of action was shown at the trial against the defendant, Jacob Snell. He was the general owner of a part of the cattle which committed the trespass, but he had rented them, with his farm, to the other defendant, who had the sole custody and control over them when the injury was done. The latter was alone liable under the circumstances for the injury."

This is a decision of the general term in our own department, and unless we are convinced that it is clearly erroneous we should regard it as controlling upon the question. We have not been able to find any decision in this state holding a different doctrine, but on the contrary it appears to be in accordance with the weight of authority.

It is said in *Cooley on Torts*, at page 340, that "The liability for the trespasses of animals is imposed not because of ownership, but because of possession and the duty to care for them. Therefore, if they are in the hands of an agister, or of any one who by agreement with the owner has the care and custody of them for the time being, and are suffered to escape and do mischief, he and *not the owner* is the party responsible."

In the case of *Kennett agt. Durgin* (59 N. H., 560) it was held that the owner of cattle kept on land of another, but remaining in his own care and control, is liable for their trespasses on land of a third person, but if the occupant of the land has the custody, he and not the owner of the cattle is liable.

In the case of *Rossell agt. Cottons* (31 Penn., 525) it was held that where cattle are placed in the possession of another for agistment, the person having the absolute ownership is not liable in trespass for injuries done by them.

In the case of *Ward agt. Brown* (64 Ill., 307) it was held that an action of trespass will not lie against the owner of cattle for trespasses committed by them while they are in the hands of an agister or bailee.

In the case of *Moulton agt. Moore* (56 Vt., 700) it was held that one having the care and custody of cattle as a lessee of a farm and the stock thereon, is under the same liability for the

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damage done by the cattle as if he were the owner (*see also Tewksbury agt. Bucklin*, 7 N. H., 518; *Gordon agt. Harper*, 7 Durnford & East, 9; *Hall agt. Pickard*, 3 Campbell's Nisi Prius, 187).

We are aware that in Massachusetts and Maine there are conflicting decisions (*see Weymouth agt. Gile*, 72 Me., 446; *Sheridan agt. Bean*, 8 Metc., 284). But in each of these cases the cattle were in the possession of an agister. An agister is one who takes cattle for hire to pasture or care for. We think there is a distinction between a person having possession of cattle as an agister and one who has possession as the lessee of a farm and the cattle thereon. In the case of an agister, the possession is more in the nature of an agent or bailee, the owner remaining constructively in the possession, and may at any time take them into his actual possession; but in the case of a lessee, the owner's interest in the cattle is parted with for the term of the lease. Within that term he is not entitled to their products, cannot regain their possession, and they are not subject to his management or control.

Without, therefore, deciding the question as to whether or not the owner would be liable in case the cattle had escaped from the possession of an agister and committed trespass, we are of opinion that, when the escape is from the possession of a lessee of a farm and the cattle thereon, the owner is not liable for the trespass.

The order of the county court granting a new trial should be affirmed.

So ordered.

BARKER and BRADLEY, J.J., concurred.

SMITH, P. J.—If the principal question in this case was *res nova*, I would incline to the opinion that the owner of cattle cannot relieve himself from his liability for damages done by them while trespassing on the lands of another by any arrangement he may make with a third person respecting their custody and control. If he leases them, his lessee is *pro hoc vice* his agent, and the owner is liable for his negligence (*Addison on*

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Torts, 324). But upon the authority of *Van Slyck agt. Snell* (6 *Lans.*, 299) I vote for affirmance.

SUPREME COURT.

CALEB WILLIAM LORING, executor, &c., of the last will of
MARY G. P. BINNEY, deceased, agt. WILLIAM G. BINNEY
and others.

Will—Construction of—Where the will directs the property to be sold, but gives no direction as to who should execute power of sale—Who to sell.

Where the will directed the property to be sold, but gave no directions as to who should exercise the power of sale, such power being one authorized by the Revised Statutes, it would be the duty of this court to designate a trustee to execute the will, provided that it could be seen, from the will itself, that the execution of the power, without such designation, would utterly fail.

But where, by the terms of the will, the realty is converted into personalty, or a sale is necessary, as its proceeds to be realized from a sale, and not the land itself, is given to the heirs, there is an implied power in the executor to sell such realty for the purpose of distribution.

Special Term, New York, May, 1885.

THIS was an action brought by the plaintiff, as executor, under the last will and testament of Mary G. P. Binney, deceased, for a judgment directing a sale of a house and lot—No. 17 Madison avenue, in the city of New York—owned by the testatrix at the time of her death. The plaintiff asked that he might be empowered to deliver a deed to the purchaser, and that the proceeds of the sale might be distributed according to the provisions of the will. The will directed the property to be sold, but gave no directions as to who should execute the power of sale.

William Watson, for the plaintiff.

George W. Van Slyck, for defendant.

Loring agt. Binney.

VAN VORST. J.—The testatrix, Mary G. P. Binney, by the seventh clause of her will, declared as follows: "I wish my property in Madison avenue, known as No. 17, to be sold, and the proceeds of such sale to be distributed among my heirs according to law."

No direction is given in words as to the person who shall exercise the power of sale.

But as the power is one authorized by the Revised Statutes, it would be the duty of this court to designate a trustee to execute the will of the testatrix, provided that it could be seen from the will itself that the execution of the power without such designation would utterly fail.

But by the terms of the seventh clause of the will the realty is converted into personalty.

A sale is necessary, as its proceeds, to be realized from a sale, and not the land itself, is given to the heirs. No other clause of the will directly touches the house and lot on Madison avenue. There are legacies given by other clauses of the will, but they are not charged upon the premises in question, and are not payable from those proceeds. The proceeds to be realized upon the sale of the Madison avenue house and lot, with the disposition of which amongst the heirs the executor is chargeable, are assets.

The distribution of those assets belong to the administration of the personal estate. It must be held, therefore, that there is an implied power in the executor to sell this house and lot for the purpose of distribution (*Meakings agt. Cromwell*, 5 N. Y., 136).

The decree to be made in this action will be settled on notice.

NOTE.—By the judgment afterwards entered in this action, the referee, under whose direction the sale was ordered to be made, was directed to pay the proceeds of the sale to the plaintiff as executor, &c., on his giving security to be approved by the court for the faithful discharge of his duties under the will, and judgment of this court, and for accounting for such moneys when required by the surrogate. The plaintiff was a non-resident of this state.—[Ed.]

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SUPREME COURT.

WILLIAM N. MILES *et al.*, as executors of the last will and testament of JAMES H. SACKETT, deceased, respondent, agt. JAMES W. SACKETT, appellant.

Evidence—When declarations of deceased inadmissible in favor of executor

In an action brought by an executor to recover property of the deceased from persons claiming to own it by virtue of a gift from the testator, declarations of the deceased, inconsistent with such claim, being self-serving, and not contemporaneous with the transaction, are inadmissible in favor of the executor.

First Department, General Term, January, 1886.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

THIS appeal is taken by the defendant from a judgment against him, entered upon the report of the referee, for the sum of \$9,595.31. The action is brought by the plaintiffs, as executors under the last will and testament of James H. Sackett, deceased, upon a note of \$5,000 and interest, made by the defendant on the 2d of March, 1874, to the said James H. Sackett. The answer of the defendant admits that he made and gave the note sued upon to James H. Sackett at the time alleged in the complaint, but alleges that two years thereafter said James H. Sackett, who was the uncle of defendant, returned the note to him and made him a gift of the same. A paper produced on the trial by the plaintiffs, was alleged by them to be the note in suit, but defendant testified that the paper was merely a copy of the note which he had made, and which was taken from him by the plaintiffs. The testimony of various witnesses was offered on behalf of the defendant, to show that at various times the deceased, James H. Sackett, made statements, admissions and declarations, some of which tended to show that he

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was about to make a gift to his nephew, the defendant, of the amount of the note; others, again, that he had made such gift, and others, that, while he expected to collect interest upon the note, he never would demand the principal. It will be noticed that all this evidence is admissions against interest by the testator, whom the plaintiffs represent. To meet and rebut these declarations of decedent against interest, the plaintiffs put on the stand Mrs. Jane C. Bush, who testified that she had a conversation with the deceased, James H. Sackett, the Monday but one before his death. The deceased died on the 5th day of May, 1878; therefore this conversation offered in evidence must have occurred in the latter part of April, 1878; that is, *four years after the making and giving of the note in suit*. It must also be noted, that the conversation sought to be elicited by Mrs. Bush's testimony, forms no part of any of the conversations testified to on behalf of the defendant; that it is not shown that the defendant was present at such conversation, or that the same was ever brought to his knowledge. The theory of the plaintiffs evidently is, that admissions against interest by the decedent, made at one time, will authorize the putting in evidence of declarations in his own favor made at another. Under the objection of defendant that the question called for self-serving declaration of the decedent, and that the conversation called for was not contemporaneous with the delivery of the note, the witness testified to declarations of deceased in his own favor, which if true, would show that the evidence of defendant's witnesses was entirely false; that the decedent held the note at the time of such conversation and expected to enforce it against defendant. The appellant respectfully urges that such evidence, which was of vital importance in the case, is entirely inadmissible. This appeal is taken upon the single ground that the improper admission of the declarations of deceased, through the witness Bush, and enough testimony is presented in the case to show upon what theory it was introduced by plaintiffs.

Theodore Connolly, for appellant, made and argued the follow-

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ing points: 1. The declarations of the deceased, as testified to by the witness Bush, being self-serving and not contemporaneous with the transaction upon which this action is brought, are inadmissible. "A party's self-serving declarations cannot be put in evidence in his own favor, whether he be living or dead, at the trial. Nor is the result changed by the statutes enabling a party to be called as a witness in his own behalf. That which he could prove by his own sworn statements he is not permitted to prove by statements which are unsworn. In any view, therefore, the extra judicial self-serving declarations of a party are inadmissible for him with the exceptions hereinafter stated as evidence to prove his case" (2 *Wharton Ev.*, sec. 1101). (The present case is not within any of the exceptions given by Wharton.) It does not seem necessary to cite many cases to prove these propositions, which are perfectly well established and familiar to the courts, but it may be of interest to trace the course of decisions in this state upon the subject. "It is," says SPENCER, C. J., in the well-known case of *Roseboom agt. Billington* (17 *Johns.*, 182), "a fundamental principle that the private *ex parte* acts of an individual shall not be evidence for him unless those acts were in collision with his interests at the time. To admit evidence of the party's own creating, I consider repugnant to every sound principle of law. Declarations by a party in his own favor never can be admitted" (*cited and followed in Wilson agt. Pope*, 37 *Barb.*, 321, 324). And in a later case it is said: "The decisions, cited in 1 *Cowen & Hill's Notes*, pages 600, 661 and 662, which seem to hold that the declarations of the alleged donor is evidence against the donee where there is a doubt as to whether a gift has been established, conflicts with principles well established in this state, and should not be followed" (*Woodruff agt. Cook*, 25 *Barb.*, 505, 511). In *Chase agt. Ewing* (51 *Barb.*, 597, 614), which is an action brought by the executor of a mortgagee to foreclose the mortgage, it was held that declarations of the testator proving that the indebtedness secured by the mortgage was a loan and not an advancement were inadmissible, and the court said at page 614: "The con-

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versations and declarations of the testator in favor of the executor in actions between him and third person are never allowable unless under some peculiar circumstances, forming an exception to the general rule. The evidence here offered was not within any exception. It was upon the main issue of the case, and clearly was incompetent evidence for the plaintiff. For this error alone the judgment should be reversed." And it was held in *Graves agt. King* (15 *Hun*, 367-370), a case on all fours with the case at bar, that in an action by an administrator to recover property of the deceased from persons claiming to own it by virtue of a gift from the testator, declarations of the deceased inconsistent with such claim are not admissible in favor of the administrator. "The rule is well settled by abundant authority that the defendants in this action could have given the declarations of the deceased against the plaintiff in the action, and, on the other hand, the general principle applicable to the character of the testimony offered is just as clearly settled against the admission of testimony in favor of the administrators" (p. 370). Citing *Chase agt. Ewing* (51 *Barb.*, 596), already referred to, and *Brown agt. Mailler* (12 *N. Y.*, 118). It will be seen that this case of *Graves agt. King* is directly in point. It is merely an application of the general principle that self-serving declarations are not admissible to the case of donor and donee. This proposition is equally true whether the self-serving declarations of decedent are sought to be introduced in evidence in an action brought by his representatives or brought against them. The reason of the rule is exactly the same in both cases. This clearly appears in a very recent case in this court. In the case of *Weller agt. Weller* (4 *Hun*, 195-197), which was an action brought against an executor of a decedent, it was sought to introduce self-serving declarations of decedent's to defeat the claim brought against the estate. The court said: "Against this is the evidence of judge SANDERS of declarations of the deceased at the time of making his will, to the effect that he did not owe any one. * * * But the declarations of the deceased were not admissible in favor of his estate, to show that he was not

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indebted to plaintiff. The declarations of a party against his interest are admissible upon the presumption that he would not speak to his own injury unless it were true; but he cannot make evidence by declarations in his own interest. The defendants represent the deceased, and they can prove no declarations of his which he could not." The authorities on this point can be multiplied almost indefinitely were it necessary, but the above are sufficient to show the course of decisions in this state. They are in accordance with the universally accepted rules of evidence and of all standard text books. Distinguish the case of *Howell agt. Taylor* (11 *Hun*, 214), of which an examination will show that the declarations sought to be introduced were against the interest of the testator. 2. The declarations of James H. Sackett, on his own behalf, were not contemporaneous with the transaction, and were therefore inadmissible. This transaction was the giving of the note by James W. Sackett, 2d day of March, 1874. And further, it not only was no part of the transaction itself, the giving of the note, but it has no connection in time or place with any of the conversations or declarations against interest of decedent introduced on behalf of defendant. The entire transaction, giving it its widest possible range, could only have covered a period from the making and giving of the note by James W. Sackett, to the time of the alleged gift of the note back to defendant, which was sometime in 1876, almost two years before the declarations put in evidence were made by the decedent. So that not only is the objection that they were self-serving fatal, but also the further objection that they were too remote, and formed no part of the transaction. What declarations form part of the *res gestæ* and what do not is clearly stated in the very recent case of *Waldele agt. N. Y. C. R. R. Co.* (95 *N. Y.*, 274), where the old rule is reiterated that declarations which are a narrative of a past transaction are not admissible (*see page 278 of that case*). 3. The declarations of James H. Sackett in his own favor cannot be introduced to rebut other declarations made by him against interest at other times and

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places. Assuming that deceased did, shortly before his death, make these declarations to the witness Bush in his own favor, they in no way tend to show that he had not made other contrary declarations against interest at other times and places. In fact, they have no bearing whatever upon the question. And whether or not the decedent made a gift of the note back to defendant in 1876, or said that he intended to do so, or had done so, could not be effected by declarations made by him in 1878, that he still held the note. See case of *Sweet agt. Northrup* (*Gen. Term, Third Depart.*, 12 *Week. Dig.*, 377), where it was held that if a deed were originally intended as a gift no subsequent declarations of the grantor could change it to an advancement. To the same effect is the well-known case of *Ogden agt. Peters* (15 *Barb.*, 560). In a Massachusetts case, which is authority, and has been repeatedly cited and approved, the case of *Hunt agt. Roylance* (11 *Cush.*, 117; 59 *Am. Dec.*, 140) the rule as to the effect of these declarations is well laid down. The court said: "The single question at issue between the parties to these actions was whether one B. H. Strobridge, one of the defendants, was a co-partner with the other two defendants, Briggs and Roylance, at the time the notes declared on were given and signed with the names of Roylance, Briggs & Co. To maintain the issue on their part, the plaintiffs offered in evidence the declarations of said Strobridge made on several different occasions to two clerks in the employment of the firm. For the purpose of rebutting and controlling this evidence, the defendant Strobridge offered evidence to prove his declarations on the subject of the partnership and his connection, *made on other occasions* than those testified to on behalf of the plaintiffs, and when neither plaintiffs nor witnesses were present. These admissions were objected to by the plaintiff, but were admitted, and this forms one of the principal grounds of the exceptions in the present case. It seems to us that this evidence was incompetent on the familiar principle that a party cannot prove his own declarations in support of his own case. The defendant had a right to prove any statements of his own which made

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a part of those offered in evidence by the plaintiff. He could explain and contradict any conversation or declaration which had been first proved against him by the plaintiffs, because such evidence tended directly and legitimately to control the case made out against him by the plaintiffs, but beyond this he could not go. His own admissions, not offered in evidence against him, had no legal tendency to control the case proved by the other side. To show a man denied being a member of a copartnership to A. to-day does not prove nor in any way tend to show that he did not admit he was a member of the firm to B. yesterday. It is simply an admission in his own favor, having no bearing on the admission proved against him" (59 *Am. Dec.*, 141). 4. For the reason above given, the judgment in this action should be reversed, and as it has been once before tried, and the first judgment reversed, the appellant asks that this present judgment be reversed and a new trial granted, with costs.

Charles H. Bailey, for respondent; *Jacob L. Haynes*, as counsel, argued that the first ground of objection to the question put to Jane C. Bush — that it called for a self-serving declaration — is not good, because defendant had been allowed under plaintiffs' objection, both as to competency and relevancy, to introduce testimony of his father and mother and other relatives, of the same James H. Sackett's declarations "without number," for a period commencing before the existence of the note and continuing until his death. And many of those declarations were, that he *would give*, or *was going to give*, defendant \$5,000 of stock of goods; others that he *had given* the \$5,000 out of his stock of goods (notwithstanding defendant concedes that his uncle never gave him the \$5,000 of stock, but sold the stock and took the \$5,000 note with three other notes for the whole) other declarations that "he" (James H. Sackett) "never intended to collect it" — "did not intend to collect the principal" — "did not expect to have it paid" — "did not intend to trouble or distress Jimmie for it; it was a gift" (all parol evidence to vary a

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written contract). And it would be monstrous, that plaintiffs could not rebut the testimony of these declarations—incompetent evidence themselves, and “without number”—by testimony of a single declaration of the same party, in the same period, relative to the same thing; *i. e.*, his intention concerning the note. In *Nesbit* agt. *Stringer* (2 *Duer*, 26), it was held, that where a defendant's liability is sought to be proved by inference from circumstances and from his verbal declarations and admissions, he is entitled to demand that all the circumstances *and all his conversations* relating to the subject-matter should be taken into consideration, even though some of the conversations took place on different days. And in this case the court said: “The law is not so imperfect, in its administration of justice, as to give the plaintiff the chances of yesterday's uncertainty, and deprive the defendant of the benefit of to-day's explanation. And where the attempt is to fasten a contract on a party for a losing undertaking by inference from circumstances and conversations, he has a right to ask, at least, that all the circumstances and all the conversations relating to the matter should be taken into consideration.” The second ground of defendant's objection; *i. e.*, that the evidence called for was not contemporaneous with the giving of the note, is not good, for the reason that the evidence called for was contemporaneous with alleged declarations of James H. Sackett, testified by defendant's witnesses, thereby sought to be rebutted, which declarations, testified for defendant, were neither contemporaneous with the giving of the note or its pretended surrender or gift to defendant, but extended to the life-time of James H. Sackett, two years later than such supposed surrender or gift of the note to defendant. The judgment should be affirmed with costs.

PER CURIAM. — The conversation between the witness Jane C. Bush, and the testator took place at a different time from the conversations proved on behalf of the defendant to maintain his defense. The object was to prove declarations of the testator

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in his own favor, against the defendant, which it was not competent for the plaintiffs to give in evidence.

For the improper admission of this evidence the judgment is reversed and a new trial ordered, with costs to abide the event.

UNITED STATES CIRCUIT COURT.

MICHAEL FRANCIS MALOY agt. HERMAN DUDEN *et al.*

Removal of cause—Citizenship—Time of removal—What constitutes a trial in the state court.

A foreign citizen or subject remains such until naturalization is complete, according to the laws of congress, although, by the state laws he might vote or hold office after the mere declaration of intention to become a citizen.

In a case otherwise within the removal act of 1875, it is the right of the defendant to remove the cause at any time "before the trial thereof." This means, before any step is taken in the actual trial of the cause, such as the empaneling of the jury, &c.

To bar the right to removal, "it must appear that the trial had actually begun, and was in progress in the orderly course of proceedings when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone."

Where, as in this case, the right to try the case at all was challenged by the defendants as soon as it was called on the day calendar and, on hearing these objections, all further proceedings in the cause were suspended until that preliminary question was determined, and in order to determine it the cause was sent into another part of the court.

Held, that the trial had not actually begun, and that the cause was not even in a condition to be tried, and the right of removal still remained.

Southern District of New York, February, 1886.

J. A. Goodlett, for plaintiff.

Ira Leo Bamberger, for defendant, Duden.

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Edward C. James and John Frankenheimer, for defendant, Baillie.

BROWN, J.—This cause, originally commenced in the supreme court of the state of New York, was removed to this court on the ground that these defendants were foreign citizens and subjects, the plaintiff being a resident of this state.

A motion is now made by plaintiff to remand the cause.

First. The first ground on which a remand is claimed is because the defendant H. Duden, a naturalized citizen of Great Britain, some two years ago filed his declaration of intention to become a citizen of the United States, though he has never applied for or obtained admission to be a citizen of this country or his final certificate of naturalization. This point has in substance been directly adjudicated by Mr. justice MILLER in the case of *Lanz agt. Randall* (4 Dillon, 425), and overruled on the ground that the foreign citizen or subject remained such until naturalization was complete, according to the laws of congress, although by the state laws he might vote or hold office after the mere declaration of intention to become a citizen. The passport issued by earl Granville to this defendant in 1880, a British citizen, together with the defendant's affidavit, furnish sufficient *prima facie* evidence that the requirements of the English statutes of naturalization had been complied with. No renunciation of allegiance to Great Britain was required by our law (sec. 2165) to be made at the subsequent declaration of intention to become a citizen of the United States. If such a renunciation was made, it was immaterial; and, so far as appears, did not make the defendant cease to be a citizen of Great Britain.

Second. The second ground upon which the motion to remand is urged is that the cause was removed too late, to wit, after the trial in the state court had been commenced. The case had been noticed for trial by the plaintiff and placed upon the equity calendar. It was called upon the call of the day calendar on November 2d. The defendants, among other objections, contended that the cause was not in condition for trial,

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because the time for serving an amended answer had not expired under an order obtained from one of the judges of the court granting further time for that purpose. The plaintiff, before the call of the cause on the day calendar, had given notice of a motion to vacate the order granting the further time to answer.

Upon the statement of these facts to the trial justice he directed the motion to vacate to be heard in another part of the court before the justice engaged in hearing motions, and suspended further proceedings before him until that motion should be determined. On going before the motion judge the hearing was adjourned until the 4th of November, and before the hearing of the motion was reached the cause was removed to this court, as above stated.

In a case otherwise within the removal act of 1875, it is the right of the defendant to remove the cause at any time "before the trial thereof." This, as construed by the courts, means before any step is taken in the actual trial of the cause, such as the empaneling of the jury (*St. Anthony, &c., agt. King, &c.*, 23 Minn., 186).

In removal cases (100 U. S., 473) the court says: "We agree that, as a general rule, the petition must be filed in a way that it may be said to have been in law presented to the court before the trial is in good faith entered upon. There may be exceptions to this rule, but we think it clear that congress did not intend, by the expression "before trial," to allow a party to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings and take his suit to another tribunal. But to bar the right of removal it must appear that the trial had actually begun, and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone."

In the present case it is clear that no step in the actual trial

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of the cause was taken. The right to try the case at all was challenged by the defendants as soon as it was called on the day calendar. On hearing these objections all further proceedings in the cause were suspended until that preliminary question was determined; and in order to determine it the cause was sent into another part of the court. As that question has not yet been determined I think, under the ruling laid down by the supreme court, it is clear that the trial had not actually begun, and that apparently the cause was not even in a condition to be tried. In this decision I take into consideration only the record, including the special term certificate, the affidavit and order extending the time to answer, and the objections taken before the trial judge.

The motion to remand must be denied.

SUPREME COURT.

ANNA MOFFAT, respondent, agt. WILLIAM MOFFAT, appellant.

Executor — Accounting — Where an executor has finally accounted before a surrogate and been discharged, how and under what circumstances he can be required to account further — Appeal — When order appointing a referee appealable.

Where an executor has finally accounted before the surrogate, the heirs and legatees of the deceased (the plaintiff's assignor being one of them) having executed a general release to the executor, and thereupon a decree having been entered judicially settling his accounts and discharging him as such executor:

Held, that the executor, having accounted before the surrogate, could not, until his accounts so rendered were impeached, be required to account further:

Held, further, that the burden of impeaching the accounts rendered, and of showing that the defendant, as executor, &c, then had in his hands money or property of the estate not accounted for is on the plaintiff, and until that burden is met, and an interlocutory judgment is rendered in the plaintiff's favor on that issue, the executor cannot properly be required to.

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account for any purpose. The impeaching facts are to be proved by the same species of evidence as any other fact.

The defendant can be called as a witness by plaintiff and compelled to testify as to whether he had any property in his hands as executor, &c., not embraced in his accounts rendered, and to specify the property; but he cannot be compelled to render an account for the purpose of furnishing evidence in the plaintiff's behalf, upon the primary issue whether he is liable to account.

Whether, upon interlocutory judgment being rendered against the executor upon that issue, he can be compelled to account generally, or only in respect to matters not embraced in his accounts before the surrogate, *quære*.

An order of special term appointing a referee to take the account of an executor, who has already accounted before the surrogate, for the information of the court, affects a substantial right, and is appealable to the general term.

Fifth Department, General Term, January, 1886.

Before SMITH, P. J., BARKER, HAIGHT and BRADLEY, JJ.

APPEAL from a special term order appointing a referee to take the account of the defendant, as executor, &c., of James Moffat, deceased, for the information of the court, and from an order denying the defendant's motion to open or modify the first mentioned order.

George Wadsworth, for appellant.

M. A. Whitney, for respondent.

SMITH, P. J.—The complaint in this action alleges, in substance, that in April, 1863, the defendant, who was named as executor in the last will of James Moffat, deceased, took out letters testamentary, and entered upon such executorship, and continued to act therein until June, 1880, when he made and filed with the surrogate his accounts as such executor, and asked for a final accounting. That said accounts were duly verified, and they purported to contain all the acts and doings of the

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defendant, as such executor, and to be a true and correct statement of the then condition of said estate, and the sums and property then remaining in his hands subject to distribution among the heirs, next of kin and legatees of the deceased entitled thereto. That one of said heirs and legatees was Edward Moffat, the plaintiff's assignor, to whom, as such heir and legatee, there appeared by the said accounts, to be due, the sum of \$3,379.75; that said Edward, relying upon the truth of said accounts so filed, and believing them to be accurate, was induced thereby to consent to such final accounting upon the basis of the said accounts, and in order that a decree might be entered, he, with other heirs and legatees of said deceased, executed a general release to the defendant as such executor, and thereupon a decree was entered on the 17th of June, 1880, judicially settling said accounts, and discharging the defendant as such executor. The complaint also alleges, that the said accounts were not truthful and correct; that they did not account for all the moneys and property in which the said Edward was entitled to a distributive share, and that, in fact, the said defendant, as such executor, &c., then had in his hands in money and good securities, subject to such distribution, the further sum of about \$48,684.10, which he failed to account for, and of which the said Edward was ignorant when he consented to such accounting and executed said release. The relief demanded is a judgment, setting aside and vacating the final decree of the surrogate discharging the defendant as executor, &c., and vacating the said release, and ordering him to account as such executor, with costs.

The answer of the defendant alleges that his said accounts were true, denies that the defendant had in his hands any money or property subject to distribution which he failed to account for, and sets up the settlement, release and decree, and payment in full in accordance therewith. Upon this state of the pleadings it seems, to us, that the order requiring the defendant to account is premature. He has accounted before the surrogate, and not until his accounts so rendered are impeached,

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can he be required to account further, even according to the theory of the complaint. The burden of impeaching the accounts rendered, and of showing that the defendant, as executor, &c., then had in his hands money or property of the estate not accounted for, is on the plaintiff, and until that burden is met, and an interlocutory judgment is rendered in the plaintiff's favor on that issue, the defendant cannot properly be required to account for any purpose. The impeaching facts, so alleged, are to be proved by the same species of evidence as any other fact. Undoubtedly, the defendant can be called as a witness by the plaintiff, and compelled to testify as to whether he had any property in his hands as executor, &c., not embraced in his accounts rendered, and to specify the property (and for the purpose of the plaintiff, upon the preliminary issue, a single item would probably be sufficient); but the defendant cannot be compelled to render an account for the purpose of furnishing evidence in the plaintiff's behalf, upon the primary issue whether he is liable to account. That would be trying the case in an order the reverse of the true one.

Whether, upon interlocutory judgment being rendered against the defendant upon that issue, he can be compelled to account generally, or only in respect to matters not embraced in his accounts before the surrogate, is a question that need not now be discussed, and we do not pass upon it.

As the orders affect a substantial right, they are appealable.

Each of the orders appealed from should be reversed. Ten dollars costs of this appeal, and disbursements, allowed to the appellant, in one case only.

BAKER, HAIGHT and BRADLEY, JJ., concur.

So ordered.

Acker agt. Jackson.

SUPREME COURT.

DAVID B. ACKER and others agt. REBECCA JACKSON.

Attachment—Insufficiency of affidavit to obtain an attachment—In granting second attachment, the same affidavit may be used as was used in obtaining the first—Code of Civil Procedure, section 636, construed.

The affidavit to obtain an attachment, when made by plaintiff's attorney, and which alleges that there is due these plaintiffs * * * over and above all counter-claims known to deponent, as deponent is informed and believes, is wholly insufficient.

As affidavit by one of several plaintiffs that the sum mentioned is due, over and above all counter-claims known to him, is sufficient.

It does not affect the jurisdiction of the court in granting the second attachment, that the same affidavit was used in obtaining the first.

Special Term, February, 1886.

MOTION to vacate an attachment against an alleged non-resident.

Charles G. Cronin, for the motion.

Shipman & Acker, opposed.

LAWRENCE, J.—This attachment cannot stand. Section 636 of the Code of Civil Procedure provides, that "If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him."

In this case one of the attorneys for the plaintiffs makes the affidavit on which the attachment was issued, and the allegation is, "that there is due to these plaintiffs from the defendant, upon the cause of action set forth in the complaint, the sum of \$163.54, over and above all counter-claims known to deponent, as deponent is informed and verily believes." Numerous cases might be cited to show that such an allegation does not comply with the provisions of the Code that the affidavit must show

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that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him; but I shall merely refer to *Murray agt. Hankin* (30 *Hun*, 37), *Cribben agt. Schillinger* (30 *Hun*, 248), *Reuppert agt. Haug* (87 *N. Y.*, 141).

Motion to vacate granted.

On the entry of the order vacating the attachment as above set forth, plaintiffs' attorneys presented an affidavit of one of the plaintiffs, in which the defect above noted was remedied, and alleging "that, as deponent is informed and believes, said defendant is a non-resident, her place of residence being at No. 331 Fairmont avenue, Jersey City Heights, in the state of New Jersey," and upon which a new attachment was issued and levied.

On motion to vacate this second attachment on the ground of insufficiency in the papers, the court held:

LAWRENCE, J.—In *Mojarrietta agt. Saenz* (80 *N. Y.*, 551), the court of appeals holds—that it does not affect the jurisdiction of the court in granting the second attachment, that the same affidavit was used which was used in obtaining the first. RAPALLO, J., in delivering the opinion of the court, says: "The new attachment was issued in the same action, and the affidavit would necessarily remain as part of the proceedings in that action. There is no positive rule that no affidavit can be twice used." When I granted the attachment now sought to be vacated, I had before me the papers which had been used on the issuing of the first attachment, and was possessed of their contents. Under the case just cited, I think they are to be regarded as having been before the court. So, regarding them, the objections which were taken to the sufficiency of the papers on which the second attachment was issued must fail. Inasmuch as the affiant, Illingsworth, swears positively that he knows the defendant, and that her place of residence is in Jersey City, in the state of New Jersey, the affidavit of Mr. Acker, in regard to the counter-claim, is sufficient. In *Stevens agt. Middleton* (14 *Week. Dig.*, 126), it was held, that an affidavit by one of several plaintiffs that the sum

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mentioned is due, over and above all counter-claims known to him, is sufficient.

For these reasons, I am of the opinion the motion to vacate the attachment must be denied.

SURROGATE'S COURT.

In the Estate of WILLIAM H. LANGE

Code of Civil Procedure, section 1822—Jurisdiction of surrogate's court, to determine whether demand of a creditor has been "disputed or rejected" within the meaning of this section—Executors and administrators—Limitation of action by creditor, where claim is rejected by executor or administrator.

The surrogate's court has jurisdiction to determine whether the demand of a creditor, claimed by an executor or administrator to be barred by section 1822 of the Code of Civil Procedure, has, in fact, been "disputed or rejected" within the meaning of that section.

New York County, February, 1886.

ROLLINS, S.—In response to a citation issued herein at the petitioner's instance, the executrix of this estate has filed an account of her administration. She now asks that that account be approved and passed, notwithstanding certain objections interposed thereto by the petitioner. She insists that she disputed and rejected the petitioner's claim in February, 1884, more than six months before any proceeding was taken for its enforcement, and that accordingly, by virtue of section 1822 of the Code of Civil Procedure, the petitioner is forever barred from compelling its payment, and must be treated as one having no interest in the estate.

The petitioner contends, on the contrary, that his claim was duly presented to the executrix, and that she has never rejected or disputed it.

The surrogate's court is a court of competent jurisdiction, to

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determine the issue whether a claim of this character against a decedent's estate has actually been disputed or rejected, or whether, on the other hand, it has been admitted by the representative of such estate (*Hoyt agt. Bonnett*, 50 N. Y., 538; *In re Jones*, 1 Redf., 269; *Ruthven agt. Patten*, 2 Abb. Pr. [N. S.], 121; *In Matter of Phylfe*, 5 N. Y. Leg. Obs., 331; *Estate of George*, 1 Law Bul., 87; *Magee agt. Vedder*, 6 Barb., 352; *Tucker agt. Tucker*, 4 Keyes, 148; *Lamber agt. Craft*, 98 N. Y., 342).

If it shall appear, upon investigation, that the petitioner's claim has been disputed or rejected, and that, within the time specified in the section above cited, no proceeding has been begun for its enforcement, the surrogate must regard such claim as barred, and must enter a decree disregarding it, and directing distribution of the estate among the parties entitled. If it shall appear, on the other hand, that the claim has not been so disputed or rejected, it must be considered as liquidated, and as an undisputed debt, which the representative is obliged to pay, and because of which the petitioner is entitled to be heard upon his objections to the account. A reference will be ordered for the trial of this issue.

SUPREME COURT.

THE PUTNAM COUNTY CHEMICAL WORKS, respondent, agt.
FREDERICK JOCHEN, appellant.

*Attachment—Summons—Sufficiency of service of summons—Irregularities in,
which do not warrant the vacating of an attachment.*

Although a summons in an action has not been served in a due and orderly manner, yet, if defendant was sufficiently advised of the proceeding to protect his rights, that does not warrant the vacating of a preceding attachment of which the defendant does not assert he was ignorant

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First Department, General Term, February, 1886.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEALS from orders denying motions to vacate attachment, judgment, execution and levy, and for liberty to renew motions. Judgment having been entered by default on the sheriff's certificate of service of summons, and execution issued and levy made, defendant then moved to vacate all proceedings, on the ground that the summons had not been served on him. It appears that the deputy sheriff gave the summons to a stranger, from whom it was taken by defendant's book-keeper, and that such book-keeper and the defendant consulted counsel, made frequent examinations of records in the court where action was pending to keep posted as to plaintiff's proceedings, and waited until entry of judgment and issuance of execution and levy before making any application. Defendant's motions were denied at special term, and such orders affirmed on appeal.

Thomas Darlington, for appellant.

Edward D. Bettens, for respondent.

BRADY, J.—The defendant insists that the summons issued in this case was not served upon him; but, if it was not served upon him as certified by the sheriff of Kings county, it was brought to his notice through the instrumentality of the deputy sheriff, Hardoncourt. The latter left the summons, he says, with a man named Brown, at his place of business, but had no knowledge of what became of it, except what Brown told him, and what Brown told him is not revealed. On being asked who Brown was, he said: "I don't know; he works in a factory there." What he meant by "there" is not disclosed, but, by connection with other facts and circumstances, it may be, and doubtless was, the factory on the corner of North Twelfth and Fifth streets, Williamsburgh, Brooklyn, E. D., Kings county.

One Blum, however, states that while he was working at the place just referred to, and in a molasses factory, and on or about

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the 31st of August, 1885, a man left some papers with him, requesting him to give them to the boss (meaning the defendant) of the chemical factory, which was also situate on that corner. The person who made this request left his card also, which bore the name of the deputy, Hardoncourt. The deputy did his work in a slovenly way. He left the papers he was required to serve with a stranger, to be given to a stranger; and, upon the faith of the papers having reached the defendant, returned the process as served. Blum (we have no affidavit from Brown) left the papers behind a clock on the premises of his employer, and some days after, on looking for them, learned that they were not there. These papers, however, reached the hands of the defendant's book-keeper, one Andersen, who informed the defendant of the facts detailed by Blum, and placed the papers in the hands of his attorney. Whether it was the defendant's attorney or Andersen's does not appear, but it does clearly appear that the defendant's attorney and Andersen were in communication about the process.

Although the service of the summons was not made in a due and orderly manner, and exception may therefore be justly taken to the proceeding in that respect, nevertheless the defendant was sufficiently advised of the proceeding to protect his rights, and the order made on the motions has done so by allowing him to come in and defend. The learned justice in the court below, however, vacated the judgment conditionally, requiring the defendant to give security. In this, we think, he erred. The attachment was not vacated but continued, and this was all that the plaintiff could justly expect under the circumstances.

It is not necessary to seek for authorities to sustain the order holding the attachment, under circumstances such as disclosed herein. The object of the summons was to advise the defendant of the commencement of the action, which had been preceded by an attachment, of which the defendant does not assert he was ignorant. Indeed, the facts and circumstances warrant the impression that the course of events was watched and uninterrupted, with a view to the motions made, and from the result

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of which the appeals are taken. This is a technical mode of action, but not always reliable. Here it fails.

In *Hilton agt. Thurston* (1 Abb. Pr., 313) the facts were similar to those disclosed herein, and there the defendant did not succeeding in avoiding the consequences.

The order granted should, however, be modified as suggested, and the defendant allowed to appear and defend on the payment of the costs of the motion.

The appeals here are thus disposed of, without costs of appeal to either party.

DAVIS, P. J., and DANIELS, J., concurred.

SUPREME COURT.

CHARLES BINGHAM agt. JENNIE BINGHAM, by guardian.

Divorce—Summons—Service by publication—Code of Civil Procedure, sections 438, 439, 440—When affidavit to obtain order insufficient

Under sections 438, 439 and 440 of the Code of Civil Procedure, in an action for divorce, for the purpose of obtaining an order to serve summons by publication, it is necessary for the plaintiff to show that he has been or will be unable, with due diligence, to make personal service of the summons.

Where the affidavit of the deputy sheriff only showed, of his own knowledge, that he went to the house where defendant resided with her mother and found it locked, the rest of his affidavit being only report or hearsay or conclusions:

Held, not sufficient to warrant an order for publication of the summons.

Held, also, that an appearance and answer by the *guardian ad litem*, was not a waiver of any defects in the service of the summons.

Oneida Special Term, October, 1884.

MOTION by defendant to set aside the order for publication of summons, and, in case this is denied, then for alimony.

B. B. Kenyon, for defendant.

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Evans & Waters, for plaintiff.

MERWIN, J.—The apperance and answer by the guardian, *ad litem*, was not a waiver of any defects in the service of the summons (*Ingersoll agt. Mangerson*, 84 N. Y., 622). The question then, is, whether the order of publication is valid. The action is for divorce. The order was under subdivision 4 of section 438 of Code of Civil Procedure, and section 439, and it provided, under section 440, for the publication in two newspapers, and dispensed with the deposit in the post-office.

Under the above sections, the action being for divorce, it was necessary for the plaintiff to show that he has been or will be unable, with due diligence, to make personal service of the summons. Upon this question the affidavits of the plaintiff, and of Mr. Coonradt, both verified June 17, 1884, furnished the basis of the order. The affidavit of Coonradt is, in substance, that he is a deputy-sheriff of Oneida county, and has been acquainted with defendant for a number of years; that her mother resides and has resided, for a long time, near Lee Centre, in town of Lee; that from about September 1, 1883, up to some time the following winter, defendant resided with her mother; that during the past eight months he has frequently seen defendant in and about the town of Lee, and supposed, up to the time the summons was given him to serve, that she resided with her mother; that on June 4, 1884, he received the summons for service, and went to the house of the mother, found no one at home and the house locked up; that he made inquiry of four persons (naming them), and others who lived near the mother's, and was told that defendant had been living with her mother, but had left, and that it was the report that she had gone off to Canada with a man—naming him—but to what place in Canada he could not ascertain; that he made inquiry of several persons in said county in reference to the whereabouts of defendant, but could get no information, except as above stated, and he names two others in Lee that he inquired of.

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The affidavit of the plaintiff states no further facts bearing upon the inability to make personal service, and it states that the last place of residence of defendant, to his knowledge, was with her mother in Lee, and that he verily believes that to be her residence.

No affidavit from the neighbors of defendant are produced. It does not appear when defendant left, or where the mother was, or that she could not be found.

The basis of the report is not shown. It may be that there was enough in the affidavits to call for the exercise of judicial discretion, and that, therefore, the order would not be impeachable collaterally (82 *N. Y.*, 256). This is, however, a direct proceeding, and the question is, whether, upon the affidavits, the order ought to have been granted.

It will be borne in mind this is not a case where the main ground is that of non-residence, and, as incidental to that, it must also be shown that the party cannot, after due diligence, be personally served. In such a case non-residence being conceded, slighter evidence of the other fact may be sufficient. But here the main substantial ground is inability to make personal service, the fact of residence here being conceded.

It must also be borne in mind that this is a divorce case. All that the deputy-sheriff really testifies to of his own knowledge is, that he went to the house where defendant resided with her mother, and found it locked. The rest is report or hearsay or conclusions.

In my opinion, the affidavits were not sufficient to warrant the order.

Further, the order dispenses with the deposit in the post-office. Still, there is nothing to indicate that the defendant would not have received papers mailed to her at her place of residence, except the report that the officer says he was told of.

This will not answer.

The order of publication and subsequent proceedings should be set aside, with costs of motion.

The motion for alimony will be dismissed.

Hossley agt. Colerick.

SUPREME COURT.

CADY R. HOSSLEY agt. NELSON J. COLERICK.

Costs, upon a motion for a new trial, upon the grounds of surprise and newly discovered evidence—Code of Civil Procedure, section 3251.

A motion for a new trial upon the grounds of surprise and newly discovered evidence, is not a motion *on a case* within the meaning of that term, as employed in section 3251 of the Code of Civil Procedure, so as to entitle a party to tax as costs the same sums as upon an appeal.

Although it is the proper practice on such a motion to settle a case, yet the whole office of the case is to enable the court, by an inspection of the same, to ascertain whether the alleged newly discovered evidence, as disclosed by the affidavits, is cumulative. The motion is made upon the affidavits; no recourse being had to the case, except for the purpose indicated, whilst a motion for a new trial *on a case*, by the very terms employed, imports a motion based wholly upon the record of the proceedings on the trial, and for some error in which a new trial is sought.

In case of an appeal from a judgment and order denying a motion for a new trial, the successful party would be entitled to the costs in controversy, viz.: sixty dollars costs of motion, and ten dollars for making amendments to case, but not otherwise.

· *Erie Special Term, January, 1886.*

MOTION by defendant for a retaxation of costs by clerk of Cattaraugus county.

J. R. & M. B. Jewell, for motion.

Thos. Storrs, opposed.

CHILDS, J.—This action was tried at the Cattaraugus circuit, and resulted in a verdict for the defendant. Subsequently the plaintiff, upon a case and affidavits, moved at special term for a new trial, "on the grounds of surprise and newly discovered evidence." This motion was denied, with ten dollars costs to the defendant.

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The defendant, upon such decision, entered an order denying motion for new trial, but containing no provision in respect to costs, and also entered judgment against the plaintiff for \$199.77 costs and disbursements, and immediately gave notice for a re-taxation of such costs by and before the clerk of Cattaraugus county.

The plaintiff, by his attorney, appeared before the clerk, and objected to the taxation of the item of sixty dollars costs of motion for new trial at special term on case, and to the item of ten dollars for making amendments to case. Whereupon the clerk disallowed said item, as well as the item of \$3.40 witness fees, which last item it is now conceded was properly disallowed.

The defendant now insists that the item for costs of motion, and making amendments to case on the motion for new trial, were improperly disallowed by the clerk. That the defendant was entitled to tax and recover these costs as a matter of right under section 3251 of the Code of Civil Procedure, as and for costs, "upon a motion for a new trial upon a case."

It may be conceded that if the plaintiff's motion for a new trial is to be regarded as a motion for a new trial *on a case*, that the defendant is correct in his contention, and the clerk should be reversed (*Guckenheimer agt. Angevine*, 16 *Hun*, 453; *Wilcox agt. Daggett*, 15 *Week. Dig.*, 208; *Selover agt. Culver*, 37 *How.*, 176; *Still agt. Rowley*, 37 *id.*, 179).

But I am of the opinion that a motion for a new trial, upon the grounds of surprise and newly discovered evidence, is not a motion *on a case* within the meaning of that term, as employed in section 3251 of the Code.

It is doubtless the proper practice, on such a motion, to settle a case (7 *Wend.*, 331); but the whole office of the case, on such a motion, is to enable the court by an inspection of the same, to ascertain whether the alleged newly discovered evidence, as disclosed by the affidavits, is cumulative. The motion is made upon the affidavits, no recourse being had to the case, except for the purpose indicated, whilst a motion for a new trial *on a*

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case, by the very terms employed, imports a motion based wholly upon the record of the proceedings on the trial, and for some error, in which a new trial is sought.

Again, if the claim of the defendant should be sustained, it would follow that a party succeeding upon a motion for a new trial, on the ground of newly discovered evidence, would be entitled to tax against his adversary the costs of such motion sixty dollars, and for making case twenty dollars. This, I do not understand, to be allowable. The granting of such a motion is regarded as a favor to the party, and the rule is, to require such party to pay the costs of the former trial as a condition (*Comstock* agt. *Dye*, 13 *Hun*, 113; *Simmons* agt. *Fay*, 1 *E. D. Smith*, 107; *Bonyng* agt. *Waterbury*, 12 *Hun*, 534-537; *May* agt. *Strauss*, 8 *Abb. N. C.*, 274).

The conclusion I have reached, seems to be in accordance with the practice adopted by the court in disposing of motions of this character, as a reference to the following cases, among others, will show that the universal rule has been to deny, with ten dollars motion, costs (8 *Abb.*, 313; 7 *Robt. [Supr. Ct.]*, 14; 66 *How.*, 8; 14 *Abb. N. C.*, 465).

It clearly appears from the opinion of the court at special term, upon which this motion was denied, that the only question there considered was the propriety of granting a new trial upon the grounds of newly discovered evidence, and the motion, therefore presents only the question here discussed.

My attention has been called to the case of *Warner* agt. *The Western Transportation Co.* (5 *Robt. [Supr. Ct.]*, 490), which holds in accordance with the views of the defendant.

The question does not seem to have received much consideration in that case, and, as it does not seem to have been followed in that court (7 *Robt.*, 14), I am constrained to follow the greater current of authority, which is not in accord with that case.

The defendant insists that the conclusion here reached is erroneous, for the reason that it deprives him of ten dollars costs allowed by section 3251, for making and serving amendments to case. I am of the opinion that, for the purpose of a

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motion for a new trial for newly discovered evidence, the service performed and serving amendments is to be treated as part of the preparation for opposing the motion, for, as we have seen, if the defendant is entitled to tax this item against the plaintiff, on the denial of the motion the same construction would permit the plaintiff, had he succeeded in his motion, to tax twenty dollars costs against the defendant for making and serving a case.

For the reasons already stated, this cannot be done. In case of an appeal from the judgment and order denying motion for a new trial, the successful party would be entitled to tax the costs in controversy here, but not otherwise.

It follows, that the decision of the clerk should be affirmed. But as the question presented does not seem to have been expressly decided in this court, without costs of this motion.

Motion denied without costs.

SUPREME COURT.

JAMES W. WHITNEY *et al.*, appellants, agt. EMIL HIRSCH *et al.*,
respondents.

Attachment—When may be issued—Code of Civil Procedure, sections 635, 8843.

In an action to recover the purchase price of goods sold and delivered, an attachment may issue and will be sustained, notwithstanding that it is alleged in the complaint, and also stated in the affidavits, that fraudulent representations were made concerning the financial condition of the business by which the plaintiffs were induced to sell and deliver the goods.

The case of *Wittnen agt. Von Minden*, 27 Hun, 234, commented on and explained.

Copies of affidavits made and filed in another action against the same defendants, brought by another plaintiff, may be used to sustain an attachment, where an inability to obtain affidavits in the action from persons whose affidavits were made in the other suit is shown.

First Department, General Term, January, 1886

APPEAL from an order vacating an attachment.

Whitney *et al.* agt. Hirsch *et al.*

Charles H. Smith, for appellants.

Blumenstiel & Hirsch, for respondents, cite *Rowe* agt. *Patterson* (15 *Week. Dig.*, 182), *Easton* agt. *Cassidy* (21 *Hun.* 459-461).

DANIELS, *J.*—According to an affidavit of one of the plaintiffs, on which, with others, the attachment was issued, and the amended complaint in the action, the plaintiffs sold and delivered to the firm of Emil Hirsch, alleged to be composed of the defendants, goods and merchandise amounting in value to the sum of \$1,080.25, and it is for the recovery of that amount that judgment was demanded in the action. But it has been insisted that an attachment could not issue in the action brought for the recovery of this indebtedness, for the reason that it is alleged in the complaint, and also stated in the affidavits, that fraudulent representations were made concerning the financial condition of the business, by which the plaintiffs were induced to sell and deliver the goods.

This, however, under section 635 of the Code of Civil Procedure, did not deprive the plaintiffs of the right to an attachment, upon complying with what has been further required to be shown by the next succeeding section. For a warrant of attachment has been allowed to be issued in an action, *first*, for the breach of a contract, express or implied, other than a contract to marry, and such a breach of contract has been alleged in the complaint, and sustained by the affidavits upon which the attachment has been issued; for it has been made to appear that the goods were sold and delivered at the request of the defendants, and that the price to be paid for them was agreed upon, and the debt has become due, and that price has not been paid. These facts present the case of a contract made to pay the purchase price of the goods, and the omissions on the part of the defendants to perform their contract, and entitled the plaintiffs to an attachment, under this subdivision of the section, by complying with the additional requirements contained in the next section. And the action for the recovery of the debt was

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not deprived of its character, as an action upon contract, by reason of the further fact that the debt had been fraudulently contracted, and the defendants, upon the recovery of a judgment, could be arrested and imprisoned upon execution. But, if it were otherwise, the plaintiffs would not be deprived by the false representations of the right to an attachment; for, by subdivision 3 of the same section, an attachment may also issue for any other injury to personal property than that provided for in subdivision 2, in which it may also lawfully issue, or for the consequence of negligence, fraud or other wrongful act; and so far as this action may be dependent upon the allegations of fraudulent representations, inducing the sale of goods, it is within this subdivision of the section. For it may also be held to be an action for fraud, as that term has been used in this subdivision, or, if not, then for an injury to personal property which has been defined by subdivision 10 of section 3343 of the Code, to include "any actionable act whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

The fraudulent representations made were certainly not a personal injury, nor the breach of a contract, but they did constitute an actionable act whereby the estate of the plaintiffs was diminished or lessened, so far as they were induced to part with their goods in reliance upon the truth of the representations.

And under this definition of an injury to personal property, an attachment might be issued in an action based upon it under subdivision 3 of section 635 of the Code.

This subject was considered in *Bogart agt. Dart* (25 Hun, 395), where it was held, by this general term, that an attachment might be issued to recover for advances made upon the faith of forged bills, notes and acceptances, and it was followed in *Weiller agt. Schreiber* (63 How., 491).

It has been supposed that *Willner agt. Von Minden* (27 Hun, 234), by its language, restricted this section of the Code, so far as to exclude an action of the present description; but it did not, and, if it did, as the cases have been prescribed by the stat-

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ute, in which attachments may be issued, the act itself would be required to be followed rather than a determination tending to abridge its effect.

As this case has been presented, it is included within the first subdivision of section 635. But, if any doubt could exist as to the correctness of that construction, it would purely be within the provision contained in the 3d subdivision of the same section. The attachment was issued upon the further ground that the defendants had disposed of their property with intent to fraud their creditors, and that charge was chiefly made to depend upon a general assignment executed by Emil Hirsch himself, in which he preferred the other defendant, Tillie Stern, in the amount \$8,141.31. This preference has been assailed as unlawful for the reason that she was, in fact, a partner with the assignor in the business carried on in his name, and assigned by the assignment; and affidavits have been produced tending very directly to establish the fact that she was a partner in the business.

The affidavits were not all made in this action, but, in part, consisted of copies of affidavits made and filed in an action against the same defendants, brought by Horace B. Claflin and others. These copies and extracts have been included, because of an alleged inability to obtain affidavits in this action from persons whose affidavits were made in the Claflin suit.

And it has been held in *Bennett agt. Edwards* (27 Hun, 352), that such extracts may be used under this state of the facts, and the correctness of that conclusion was in no manner doubted in *Wilmerding agt. Cunningham* (65 How., 345), where only the results deemed to be supported by the affidavits were contained in that upon which the attachment was based, and that was held not to be sufficient, and the same rule was followed in *Greenbaum agt. Dwyer* (66 How., 266). Under the facts, as they have been disclosed therefore, the extracts from the affidavits on file may lawfully be made use of to support the plaintiffs right to the attachment. The statements extracted and the affidavits copied were made under the the restraints of oaths adminis-

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tered for the purpose, and; if they could be shown to be wilfully false, the persons making them would be liable to conviction and punishment for the crime of perjury under the laws of the state, as much so certainly as though the affidavits containing these extracts, and those copied, were made in this action.

These extracts and copies, to a reasonable degree of certainty establish the fact that the defendant, Stern, formed a partnership with the defendant, Hirsch, in the business, and she probably continued to be a partner through the time when the plaintiffs goods were sold and delivered. The only qualification of her relation to the business was stated by her husband to be, that he informed Mr. Hirsch that he wanted to withdraw the money which had been invested in the business on behalf of his wife. That was objected to by Hirsch, because it would break him up to withdraw the capital, and he is stated by her husband to have added: "You remain here; I will engage you as assistant clerk in the business under a salary, arranging that the money was to remain in the business until January 1, 1884, which I consented to on behalf of my wife."

This was not considered by Hirsch to exclude her from her rights as a partner in the business, and he is so stated to have informed the plaintiffs' attorney on the 21st of July, 1884, when, according to his affidavit, Hirsch said Tillie Stern and himself were partners, and a like statement is verified by Leo Frank, a copy of whose affidavit, in the Clafin suit, was contained in the papers upon which the attachment was issued. As the case was presented, there was certainly reasonable ground for believing that Tillie Stern continued to be a partner with Hirsch all through the times when the plaintiffs' goods were sold and delivered, and the assignment was subsequently made November 22, 1883, and, being a partner in the business, it was fraudulent to prefer her as a creditor in the general assignment made for the benefit of creditors. Substantially the same state of facts was presented in the case of *Clafin agt. Hirsch*, where it was held by the general term that the attachment could legally be

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issued and sustained, for the reason that there had been this fraudulent disposition of the debtor's property. The attachment issued in this action ought not to have been vacated, and the order vacating it should be reversed with the usual costs and disbursements, and an order entered denying the motion.

BRADY, J. (dissenting). — The complaint herein alleges, that the defendant fraudulently contracted the debt for which judgment is demanded, and it is thus brought within the provisions of subdivision 4 of section 549 of the Code, and which distinctly provides that, where such an allegation is made, the plaintiff cannot recover unless the fraud is established, and, further, that a judgment for the defendant is not a bar to a new action upon the contract only. In such an action this court held distinctly, that an attachment under the provisions of the Code could not be maintained (*Wiltner* agt. *Von Minden*, 27 *Hun*, 234).

The judgment under the complaint in this action in favor of the plaintiffs, would authorize the imprisonment of the defendant if it were not paid. This view renders it, perhaps, unnecessary to consider any other question suggested upon the appeal. Nothing either in the case of *Muser* agt. *Lisner* (67 *How.*, 509), in this department, or in *Ledwich* agt. *McKim* (53 *N. Y.*, 307), at all conflicts with the results stated.

The plaintiffs are bound in the prosecution of their remedy by the allegations in the complaint, and their success, as we have seen, is dependent upon the proof of those allegations. If not successful, they are not deprived, as we have seen also, of a new action founded upon the contract alone, by which the defendants became responsible. They would not be entitled, therefore, even if the evidence sufficiently established the fact, to an attachment in this action, upon the ground that the defendants had fraudulently disposed of their property with the intent to defraud their creditors. For these reasons the orders appealed from should be affirmed.

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DAVIS, *P. J.* (concurring).—My brothers, BRADY and DANIELS, not concurring in their views in this case, it becomes necessary that I should state the grounds on which I think the disposition of the appeal should be made.

The action is brought to recover for goods sold and delivered. It is, therefore, an action upon contract. In such an action, under the provisions of section 549, subdivision 4, where, for the purpose of arresting the defendant, it is claimed that the defendant was guilty of a fraud in contracting or incurring the liability, it is necessary that the allegations of fraud should be made in the complaint in issuable form, so that they may be tried by a jury or by the court; but this fact does not change the action from one upon contract. It only affects the remedy, provisional and final, and subjects the plaintiff, if he fail to prove the alleged fraud, to bring a new action upon the contract as one not so fraudulently contracted. As the action, notwithstanding the allegations of fraud, continues to be one upon contract, there seems, to me, no reason why the attachment may not be sustained. The case relied upon by BRADY, J., is not applicable (*Wiltner agt. Von Minden*, 27 *Hun*, 234). That was a case where the action was brought to recover damages for an alleged fraud, and not to recover the purchase price of goods sold and delivered.

If the question decided in *Wiltner agt. Von Minden* were an open one, it might well be doubted whether the attachment, in this case, could not be upheld under the 3d subdivision of section 635 of Code, which gives an attachment in an action for any injury to personal property in consequence of negligence, fraud or other wrongful act, and under the definition of injury to property—section 3343, subdivision 10 of Code—the inducing of a sale and delivery of property by fraudulent representations, is clearly an act for which an attachment is allowable.

I concur with DANIELS, J., that the order in this case should be reversed.

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SUPREME COURT.

THE BUFFALO LUBRICATING OIL COMPANY, limited, agt. HIRAM B. EVEREST and another.

Practice—New trial—When will be granted on the ground that the damages found by the jury are excessive.

Granting new trials on the ground that the damages are excessive, in cases where the jury are allowed to award smart money, is comparatively a modern practice, and had its origin in the English courts.

In cases where the court can see, without mistake, the amount mentioned in the verdict as punitive damages, it is now the universal practice to examine the whole case with care, and determine whether the sum so included is so large as to shock the judgment of most intelligent and dispassionate men.

Where, as in this case, there is no chance for mistake, and the jury did allow \$16,000 as smart money as a punishment to the defendants for enticing away a servant from the plaintiffs who at the time he left its employ, was one of its stockholders and chief executive officers, a new trial should be granted on the ground that the damages are excessive.

Erie County Special Term, February, 1886.

MOTION by the defendant for a new trial, founded on exceptions taken to rulings on the trial, and also upon the ground that the damages are excessive. The verdict was for \$20,000.

William F. Cogswell, for the motion.

Adelbert Moot, opposed.

BARKER, J.—The plaintiff is a corporation organized under the general statute for the purpose of refining petroleum oil, its place of business being the city of Buffalo.

The action is in tort.

The complaint charges that the defendant, with malicious motives, and with intent to injure, destroy and break down the

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plaintiff's business, did persuade and entice from the plaintiff's service its servant, one Albert A. Miller.

The defendants are stockholders in, and the executive officers of, the Vacuum Oil Company, also engaged in refining oil, at the city of Rochester.

The plaintiff commenced operations in June, 1881, by planning, locating and constructing its works.

Miller had large experience in the business, and it was conceded that he was well-qualified to plan and superintend the construction of the works.

He was one of the promoters of the company, a stockholder and its vice-president. By an arrangement or understanding with the managing board, he was to act as superintendent in constructing the works, and in manufacturing the oil, and was to be allowed \$1,200 a year for his services.

About the time the works were so far completed as to commence distilling oil, and about the first of July of the same year he left the plaintiff's employment, and, in September, sold out all his interest in the company, and ceased to act as one of the officers, or to have any connection with the company. The stock and interest held by Miller in the company was, at that time, transferred to the company by an arrangement with the active officers and managers of the company, and he was informed by them that the company had no further need of his services.

The plaintiff gave evidence tending to show, that Miller left the plaintiff's employ on the joint solicitation of the defendants, and that they acted from malicious motives, hoping to injure the plaintiff's business, delay its successful operations, if not to break down the company.

The court instructed the jury as to the rules of law applicable to the case, by which they would be guided in ascertaining the plaintiff's actual damages, as to which the defendants took no exception, but the plaintiff did several.

The court also instructed the jury, in substance, that the case presented such circumstances and features that they might, in their discretion—in addition to the plaintiff's actual damages,

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as they should determine them to be—add exemplary or punitive damages, for the purpose of punishing the defendants for their unlawful and malicious conduct, and for example's sake, if, in their opinion, the plaintiff's actual damages were not a sufficient punishment for their wrong-doing, but that, in considering the question, they should act with the greatest caution and circumspection.

By the rule adopted by the court, in the charge to the jury, by which the plaintiff's actual damages were to be measured, they could not, in any event, exceed \$4,000, according to the whole evidence bearing on that subject.

So, it appears, beyond all controversy, that the jury awarded by their verdict \$16,000 as smart money.

In disposing of the question whether the damages are excessive or not, it must be assumed that the jury followed the directions of the court in determining the plaintiff's actual damages. Any other view of the case would altogether deprive the defendants of their point, that the damages are excessive.

The party who has lost the verdict was content with the rule of damages adopted, and for the court now to hold as the plaintiff argues, that the rule was unfair and erroneous so far as the plaintiff's rights were involved, and the jury were justified in disregarding the instructions of the court, and did adopt and follow a rule of their own in ascertaining the plaintiff's actual damages, would be unfair to the defendants, and has no sanction in precept or practice. If the plaintiff has confidence in the exceptions, which were taken in its behalf to the rule of damages laid down in the trial, and feels aggrieved and injured thereby, it should move thereon for a new trial. By the exceptions taken, a means of review is secured in all the higher courts.

Our system of jurisprudence is based upon the fundamental proposition that the court, and the court alone, decides all questions of law; and it necessarily follows from this that, if the jury disregard the instructions of the court on any question of law, their verdict will be set aside. It is by this power, and the

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exercise of it by the court, that the control of the court over questions of law can be preserved.

Therefore, if it could be discovered that the jury did disregard the instructions, as the rule by which the actual damages were to be ascertained, it would be the duty to grant a new trial for that reason.

The plaintiff, as a matter of law, was entitled to all his actual damages and more—not one dollar.

There is also another valuable and well-established rule, that, in cases of trespass or tort, accompanied by fraud, malice or oppression on the part of the wrong-doer, the jury have a discretion to award exemplary or vindictive damages. The case at bar is one of this class of actions, if the plaintiff is entitled to recover anything for actual damages.

I am fully persuaded, however, after the most deliberate consideration of the question, that the sum awarded as punitive damages is so extravagant and excessive as to indicate that the jury were guided in their action by prejudice, passion or sympathy. They had fixed the plaintiff's actual damages, as we may assume, at the utmost limit permitted by their instructions, and to that sum they added the four-fold sum of \$16,000.

In this case, unlike many others, we can ascertain the amount of the punitive damages assessed by the jury above the actual injury sustained.

The power and the duty of the court to interfere and grant new trials where the damages are excessive, is fully established in the jurisprudence of this state. At the same time, the verdict of the jury should not be interfered with lightly, nor until the mind of the court is seriously impressed that the punishment imposed by the jury on the wrong-doer by their verdict is oppressive and unreasonable, and more than jurors usually award in like cases, and beyond what the courts are accustomed to approve (*Houghkirk agt. Delaware and Hudson Canal Co.*, 92 N. Y., 225).

I do not cite any of the cases where the courts have granted or refused to grant new trials on this ground. I have, I be-

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lieve, in my examination, read every leading case decided in England or in this country, and I find none which can be cited as a precedent for denying the defendant's motion, and allowing this verdict to stand. Granting new trials on the ground that the damages are excessive—in cases where the jury are allowed to award smart money—is, comparatively, a modern practice, and had its origin in the English courts. In cases where the courts can see, without mistake, the amount mentioned in the verdict as punitive damages, it is now the universal practice to examine the whole case with care, and determine whether the sum so included is so large as to shock the judgment of most intelligent and dispassionate man.

This case is to be distinguished from a class of cases like libel and slander, assault and battery, seduction and *crim. con.*, where sentiment and feeling are largely involved, and it is, therefore, quite impossible for the court to separate the sum of actual damages from the verdict, and thus discover the real sum awarded as a punishment to the defendant.

In this case there is no chance for mistake. The jury did allow \$16,000 as smart money as a punishment to the defendants for enticing away a servant from the plaintiff, who, at the time he left its employ, was one of its stockholders and chief-executive officers. Miller, himself, was one of the board of trustees, who had a right to decide whether a servant in the employ of the company should remain or be discharged.

I do not consider the exceptions taken by the defendants, but grant the order for a new trial on the ground that the damages are excessive.

New trial granted on the defendants paying the taxable costs of this action, after notice of trial, including the costs of this motion, together with disbursements, to be paid within twenty days after taxation and notice, and, if not paid, motion denied with costs.

Cronin agt. Cronin.

CITY COURT OF NEW YORK.

MARY CRONIN agt. JOSEPH CRONIN.

Costs—In interpleader actions—Code of Civil Procedure, sections 8228, 8229, 8280.

Where upon the trial of an action in which interpleader was allowed under the Code, the plaintiff established title to part of the fund in court and the defendant to the balance, and on the pleadings each party denied all; *Held*, that neither was entitled to costs "as of course," but that the award of costs in such cases rested in the discretion of the court.

Special Term, February, 1886.

THE bank for savings had on deposit to the credit of "Mary Cronin and husband, Joseph, or either," the sum of \$747.98. The plaintiff brought an action against the bank, claiming the entire deposit, and the bank moved for and obtained an order interpleading in its place the present defendant, on the ground that he also made claim to the same fund (*Mulcahy agt. Emigrant Industrial Savings Bank*, 89 N. Y., 435). The bank, under this order, was allowed to retain the fund at interest, subject to the further order of the court, leaving the rival claimants to establish their title to it. The defendant in his answer admitted the plaintiff's title to \$125 of the sum on deposit and claimed the balance as his own. The plaintiff served a reply to the answer, in which she reiterated her claim to the entire fund. The issue was tried and the jury found that \$425 of the fund belonged to the plaintiff and the balance, \$322.98, belonged to the defendant. Neither can properly be called the "prevailing party," because each was to an extent unsuccessful. Each party denies the right of the other to costs, and the court is called upon to determine whether either, and which, of the parties is entitled to costs under the peculiar circumstances stated.

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Howe & Hummell, for plaintiff.*John A. Mott*, for defendant.

MCADAM, C. J.—The action of interpleader is of equitable origin, and the remedy provided by the Code is merely concurrent (9 *How. Pr.*, 193; 1 *E. D. Smith*, 665; *S. C.*, 8 *How. Pr.*, 45; 14 *id.*, 505). The principles which govern the remedy, either in equity or under the Code, are alike, and the rule formerly prevailing as to costs should, as far as practicable, be applied to the present practice. It is evident that the general provisions of sections 3228 and 3229 of the Code as to costs, were not intended to include interpleader actions, where (as here) each party prevails in establishing title to a substantial part of the fund in dispute. The case, in consequence, falls within section 3230, which leaves the award of costs discretionary with the court. This construction agrees with that approved by *Willard* in his work on *Equity Jurisprudence* (*Potter's ed.*), 321, where he says, that the Code (*sec.* 306 of old, and *sec.* 3230 of new) "vests the court with the same discretion in such actions as existed before," and under the former practice costs were not matter of right in interpleader cases. They rested in the discretion of the court (*Bedell agt. Hoffman*, 2 *Paige*, 199). This also accords with the present general legislative intent (2 *R. S.*, 617, § 20; 3 *Wait's Pr.*, 468, 469; *Code*, § 3234). The legislature certainly did not intend, even under the interpleader allowed by the Code, that a defendant whose defense was meritorious, and who succeeded in it to the extent of prevailing in the action equally with the plaintiff, should be arbitrarily mulcted with costs, "as of course," for presenting a claim fully as just as that made by his adversary. Such an interpretation would be harsh and oppressive, and tend to establish an immutable rule which might, in some cases, work great injustice. The intention was to avoid this possible result by leaving the question of costs in such actions to the discretion of the court.

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that they might be allowed or withheld according to equitable principles and in furtherance of justice. This intent (if it required further evidence to make it manifest) will be found in the statute (3 R. S., 6th ed., 378, § 392), which provides that where the title to a fund on deposit with a savings bank is disputed, an interpleader may be allowed, to the end that the rival claimants interested in the dispute may be brought into the litigation and the bank allowed to drop out, and which further provides that "the question of costs in the actions referred to shall, in all cases, be in the discretion of the court, and may be charged upon the fund affected by such action." It is clear, therefore, that the award of costs rests entirely in the discretion of the court, and the only question left is to exercise the discretion for the best interests of all concerned, keeping in mind the smallness of the fund. The plaintiff and defendant are husband and wife; they disagreed, and, in consequence, separated. Law suits followed, and this is one of them.

As usual, in such intestine quarrels, each of the parties is right to an extent, and beyond that wrong. The interests of all will be best subserved by holding that each of the litigants have the portion of the fund to which they are respectively entitled; that neither have costs against the other; that the costs of the respective attorneys be not charged on the fund; and that the attorneys on each side be left to regulate his fee with his client when the fund is paid over.

The disbursements incurred by each of the litigants in determining the title to the fund, should, as a necessary incident, be taxed and charged upon the fund, but the application for further costs or allowance will be denied. A decree in accordance herewith may be submitted.

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CITY COURT OF NEW YORK.

RICHARD P. ROTHNELL agt. AUGUSTUS G. PAINE *et al.**Order of arrest—Undertaking on—When sureties liable—Code of Civil Procedure, sections 549–559.*

Where an order of arrest is obtained in an action where the cause of action and cause of arrest are identical, and the order of arrest is vacated on motion, and the plaintiff on the trial withdraws by stipulation the allegations of fraud from the complaint.

Held, that the order vacating the order of arrest became the final decision that the plaintiff in said action was not entitled to the order of arrest, and an action was maintainable upon the undertaking for damages sustained by reason of the arrest.

General Term, February 1886.

Before MCADAM, C. J., and HALL, J.

Abram Kling, for respondent.

Edward M. Sheppard and James H. Fay, for appellants.

HALL, J.—This is an appeal from a judgment in favor of plaintiff entered upon the verdict of a jury at trial term and from an order denying defendants' motion for a new trial upon the minutes and exceptions.

The action is brought upon an undertaking executed by defendants as sureties in an action in the superior court of the city of New York, wherein James P. Tuttle was plaintiff and the plaintiff herein was defendant, and was given in pursuance of the requirements of the Code of Civil Procedure to procure an order of arrest against the plaintiff herein.

The condition of the undertaking is that "if the defendant in the said action do recover judgment therein, or if it is finally decided that the plaintiff is not entitled to the order of arrest, the plaintiff will pay," &c.

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The cause of action recited in the undertaking is breach of trust and fraud, and the cause of action and the cause of arrest are identical.

The order of arrest was vacated upon motion, and an appeal having been taken to the general term of the superior court, the order vacating said order of arrest was affirmed.

The action in the superior court was brought to trial on the 7th day of November, 1883. The counsel for defendant in that action moved that the plaintiff be called upon to elect which of the three causes of action set forth in the complaint the plaintiff relied upon, and thereupon the plaintiff's counsel consented to strike out from the complaint the sixth and seventh clauses and part of the ninth clause.

An examination of the original complaint shows, that by striking out the portions thereof above mentioned, the charges of fraud would be entirely eliminated, and the action would be one for money had and received in a fiduciary capacity, and for an accounting in regard to the same.

The trial of the superior court action was had upon such election and stipulation, except that the defendants' counsel withdrew his consent to strike out part of the ninth clause, and I suppose no verdict was reached, as I find no record of any in the case.

On the 23d of November, 1883, an order was entered at trial term in the superior court before the same justice who tried the cause, reciting the stipulation made by the attorney for the plaintiff, and amending the complaint in pursuance thereof by striking out the sixth and seventh clauses, and in other unimportant particulars. No motion was made to set aside that order, nor was an appeal taken therefrom.

This left in the complaint the words in the ninth clause which plaintiff's counsel had consented to have stricken out upon the trial, but which the defendant's counsel had not consented to at that time.

And on the 12th day of December, 1883, an order was made on motion of the defendants' attorney in that action, and op-

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posed by plaintiff's attorney therein, striking out from the ninth clause of the complaint the portion thereof charging fraud on the part of the defendant in inducing plaintiff to part with the shares of Gatling stock as irrelevant and immaterial, and no appeal has been taken from that order, but an amended complaint was served omitting all allegations of fraud.

This action upon the undertaking was commenced in this court on the 12th day of November, 1883, being after the trial of the superior court action and the election and stipulation made therein by plaintiff's attorney, but before the entry of either of the orders amending the complaint.

Upon the trial of this action the court held that the plaintiff was entitled to a verdict, and instructed the jury to fix the amount of damages, and the jury awarded plaintiff \$1,000.

The exceptions taken by defendants' counsel upon the trial, and the points upon the argument of this appeal embrace several propositions of law, either one of which, if sustained, would necessitate a reversal of the judgment. The questions raised may be briefly stated as follows:

First. That the form of the undertaking is not in accordance with the statute, being several instead of joint and several.

Second. That at the time of the commencement of this action the plaintiff had no cause of action, because there had been no final decision that the plaintiff in the undertaking was not entitled to the order of arrest, and that the cause of action and cause of arrest being identical, there could be no final decision upon that question until the trial or discontinuance of the action.

Third. That the orders of the superior court made on the 23d of November and 12th of December, 1883, amending the complaint in that action by eliminating therefrom all questions of fraud, if they could in any event be considered to amount to a final decision that the plaintiff in that action was not entitled to the order of arrest could have no retroactive effect, and as they were not made until after this action was commenced, they gave no new rights to the plaintiff herein, and that he must

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stand or fall upon the facts as they existed at the time of the commencement of this action; and

Fourth. That the amendments to the complaint in the superior court action were not pleaded in this action, and that, therefore, evidence in regard to such amendments was inadmissible upon the trial.

It is an elementary principle and needs no citation of authorities, that the sureties upon an undertaking can be held liable only upon the contract which they have made, and that any variation of the contract without the consent of the sureties would release them.

But the defendants executed the undertaking upon which this action is brought, agreeing to pay damages in case the defendant in the undertaking recovered judgment, or in case it was finally decided that the plaintiff was not entitled to the order of arrest. Upon the happening of either of those events, the liability of the defendants herein became fixed and determined. There was no agreement or understanding that those events should be brought about in any particular manner, as by a judgment in favor of defendant upon a trial, or by a discontinuance or dismissal of the action, or by motion, and if those events, or either of them, have come to pass before the commencement of this action the defendants are liable.

The defendants must be held to have executed the undertaking in contemplation of the right of the superior court to make its own record and to amend it in any lawful manner, and if the order of the superior court, at special term, setting aside the order of arrest, and which was affirmed at general term, together with the election and stipulation of the attorney for the plaintiff upon the trial of the action in that court, and the orders of November 23d and December 12, 1883, all taken together, constitute a final decision that the plaintiff in that action was not entitled to the order of arrest, there can be no question but the plaintiff can maintain this action.

If the question were new or open to discussion, I should be inclined to say that even in a case where the cause of action and

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the cause of arrest were identical, that an order of the court discharging the order of arrest, especially if affirmed on appeal, would be a final decision that the plaintiff was not entitled to the order of arrest, otherwise there could be no need, in such an action, of having the two contingencies mentioned in the undertaking. The use of the disjunctive or, would seem to indicate that the defendant in the undertaking had two separate ways of determining the liability of the sureties—one by the trial of the action, the other by moving to discharge the order of arrest. It is a rare occurrence for an order of arrest, in such an action, to be discharged upon motion, and the facts justifying such a course must be very strong and convincing, the courts rather preferring to have the entire question passed upon at the trial; but still cases do arise, and this appears to have been one of them, in which, although the cause of action was the same as the cause of arrest, the defendant was able to convince the court, upon a motion, that the plaintiff was not entitled to the order of arrest, and had not been guilty of the fraud charged.

But in the case of *Staab agt. Shupe*, decided by the general term of this court, and reported (1 *How. [N. S.]*, 4), it was held, following an intimation in the case of *Schuyler agt. Englert* (10 *Daly*, 463), that in a case where the cause of arrest and the cause of action were the same, no action could be maintained upon the undertaking until the final determination or decision upon the matters upon which the order of arrest was granted, and that an order setting aside the order of arrest was not alone a final decision that the plaintiff was not entitled to the order of arrest; we are, of course, bound by this decision, and it remains only to inquire whether the proceedings in the superior court upon the trial of the action, taken together with the order discharging the order of arrest, constitute a final decision that plaintiff in that action was entitled to the order of arrest.

The gravamen of the original complaint in the superior court action was fraud, but after the discharge of the order of arrest and upon the trial of the action the plaintiff's counsel consented, and elected to strike out from the complaint all the allegations.

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of fraud. Defendants' counsel did not consent to have stricken out the allegations in the ninth clause charging the defendant therein was guilty of fraud in inducing plaintiff to part with his 749 shares of stock, &c., and the case went to trial upon the complaint as thus amended, but no formal order was entered at that time amending the complaint.

It must be conceded that if the orders which were subsequently made amending the complaint had been made upon the trial of the superior court action, or before the commencement of this action, the plaintiff's cause of action would have been complete, because the allegations of fraud having been withdrawn, there was no such issue remaining, and the order of the general term affirming the order discharging the order of arrest would then have been a final decision that plaintiff was not entitled to the order of arrest, and in fact would have been the only decision which could have been made upon that matter. The trial of the action could only decide a question of contract, and not of fraud, and the discharge of the order of arrest would be the final decision, precisely as if the arrest had originally been made on facts aliunde the complaint.

It cannot be seriously contended that because the plaintiff in the superior court action elected to eliminate the question of fraud, and thus prevented a trial of that issue, the undertaking became absolutely void because no final decision could be had. If such a claim was sound in law or reason, it would furnish a very convenient and speedy mode of releasing sureties upon undertakings, but one which would hardly be acceptable to the defendant who had been arrested.

But it is not necessary in any event that an actual trial of the issue of fraud should be had, unless the plaintiff in the action so elects. If he suffered a default or discontinued the action there would be no trial of that issue, but still the sureties would be liable on the undertaking.

The order of the superior court of November 23d was merely recording upon the files of the court what had taken place upon the trial. It was nothing new, but was simply declaratory of

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the former proceeding of the court, and completed and established the record of that transaction. The order recites the stipulation made upon the trial, and relates back to the date of the trial and has the same effect as if made at that time.

The order of December 12th simply struck out from the ninth clause the statement in regard to fraud as irrelevant and immaterial, and the order so declares.

The court says in effect the charge of fraud was waived and stricken out upon the trial, and the cause of action was to recover the proceeds of the 10,700 shares of Canada Consolidated Mining Stock, thus affirming the conversion of the 749 shares of the Gatling stock into said 10,700 shares of mining stock, and, therefore, a charge of fraud in obtaining said 749 shares had no place in the complaint. If it was immaterial or irrelevant to the cause of action it did not present any charge of fraud for trial, and the order striking it out relates back to the time of the trial, because if it was irrelevant when stricken out it had always been so, and the order of the court merely recorded it.

The facts upon which this action could be maintained existed at the time of the trial of the superior court action, but the evidence was the record as that court made it.

A parallel case to this would be an action to recover an installment of rent due under a lease. A trial is had and the lease is decided to be void in law; an appeal is taken, and pending the appeal an action is commenced to recover another installment of rent under the same lease; certainly at the time the second action was begun the plaintiff would have no cause of action as there has been an adjudication that the lease is void, but if upon the appeal in the first action the judgment is reversed, the reversal would relate back to the time of rendering the first judgment, and the second action could then be maintained, notwithstanding the fact that at the time it was commenced there was no cause of action.

The claim of defendants' counsel that the undertaking being only several instead of joint and several and therefore void,

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cannot be sustained, the defendants can hardly complain that their liability is less than the requirement of the statute, and it is not sought to hold them jointly in this action.

The defendant in the superior court action might have complained that the bond was not according to law, and had it corrected, or, perhaps, had the order of arrest vacated on that ground; but it does not come with good grace from defendants to say that they have given a worthless bond upon which the defendant was arrested and then claim exemption from liability.

The amendment of the complaint in the superior court action is sufficiently pleaded in the complaint herein to admit the orders of amendment in evidence, and if not, the complaint may be now amended to conform to the proof.

The judgment and order denying motion for a new trial must be affirmed, with costs to respondent.

SUPREME COURT.

JOHN H. MYERS *et al.*, executors, etc., agt. FRANK D. CRIM
et al., executors, etc., of JUSTUS S. D. CRIM, deceased.

Promissory note—Complaint—What must be alleged in action against indorser of promissory note.

In action against an indorser of a promissory note where the indorsement was subsequent to the inception of the note, the complaint must allege a consideration for the indorsement.

This is necessary, as a consideration must be proved, the indorsement being subsequent to the inception of the note and not alleged to have been done in pursuance of any arrangement made at the time the note was made.

Herkimer Special Term, December, 1884.

DEMURRER to complaint on ground that it does not state facts sufficient to constitute a cause of action.

Myers *et al.* agt. Crim *et al.*

Mr. Richardson, for defendant.

Brown & Mitchell, for plaintiffs.

MERWIN, J.—The complaint is against the executors of Justus S. D. Crim, deceased, who is alleged to have indorsed two notes made by W. T. Crim to the order of J. H. Myers, the plaintiffs' testator. One is dated May 29, 1876, for \$1,100, and the other for \$700, dated September 8, 1876, each payable in one year from date, with interest. Each was delivered to Myers for value soon after its date, and then afterward, while Myers owned them, and on about July 1, 1877, J. S. D. Crim indorsed them.

There is no allegation of any consideration for this indorsement. This was necessary, as a consideration must be proved, the indorsement being subsequent to the inception of the note and not alleged to have been done in pursuance of any arrangement made at the time the note was made. The authorities establish conclusively the necessity of such consideration (*Story on Prom. Notes*, sec. 474; *Daniels on Neg. Inst.*, secs. 679, 1760; *Good* agt. *Martin*, 95 U. S., 93; *Collier* agt. *Mahan*, 21 Ind., 110; *Tenney* agt. *Prince*, 4 Peck, 385; *Mecney* agt. *Stanley*, 8 Cush., 85; see also 21 Wend., 588; *Edwards on Bills* [2d ed.], 259, note; *Draper* agt. *Chase Manfg. Co.*, 2 Abb. N. C., 79; 15 Hun, 303).

For lack of allegation of consideration the demurrer must be sustained. It is not necessary to consider the other questions raised, as they will very likely be avoided in case of amendment.

The ordinary leave to amend should be given on payment of costs of demurrer. The proper findings may be submitted.

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SUPREME COURT.

SAMSON WALLACH agt. FANNIE STRAUS HOEXTER and others.

Husband and wife—Duress of husband—What is not sufficient to invalidate mortgage executed by wife.

The constraint and duress which has generally availed to impeach a contract, even as to transactions between husband and wife, has proceeded from actual violence or well grounded fear of personal injury. An assent obtained through such means is regarded as neither freely or voluntarily given, and as creating no valid obligation.

Where the evidence showed that the defendant executed the mortgage through the persuasion of her husband, and for his benefit, and through threats on his part that if she did not do so, "he would come in and go out of the house as he pleased," and would "stay away from her at nights, and would withhold speech from her":

Held, that although these threats may have constituted the chief reasons why she executed the mortgage, yet as in the end she consented to do so, and did sign the papers voluntarily, there was no duress or illegal constraint exercised sufficient to impeach the mortgage in the hands of an innocent lender of money within the meaning of those terms, as understood in the courts.

Special Term, February, 1886.

Leopold Wallach and John E. Parsons, for plaintiff.

Townsend, Dyett & Ernstein, for defendant, the mortgagor.

VAN VORST, J.—The defendant Fannie Straus Hoexter, a married woman, being seized of a separate estate, at the instance and upon the urgency of her husband, mortgaged the same to the plaintiff. In this action, which is brought for its foreclosure, she seeks to avoid the mortgage, upon the ground that she executed the same under duress of her husband, she receiving no consideration therefor.

The evidence does not justify the conclusion that the mortgage was executed under circumstances of constraint amounting to duress. That the defendant executed the mortgage through

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the persuasion of her husband, and for his benefit, and through threats on his part that if she did not do so "he would come in and go out of the house as he pleased," and would "stay away from her at nights and would withhold speech from her," admits of no denial.

The fear that her husband would withdraw himself from her society at his pleasure and seek enjoyment elsewhere, or that when in her presence he would remain silent, in case of her refusal to do what he wished, may have constituted the chief reasons why she executed the mortgage, but in the end she consented to do so and did sign the papers voluntarily.

There was no duress or illegal constraint exercised sufficient to impeach the mortgage in the hands of this plaintiff, who was an innocent lender of money, within the meaning of those terms, as understood in the courts.

The constraint and duress which has generally availed to impeach a contract, even as to transactions between husband and wife, has proceeded from actual violence or well grounded fear of personal injury. An assent obtained through such means is regarded as neither freely or voluntarily given, and as creating no valid obligation.

Such was the character of the duress in *Loomis agt. Ruck* (56 N. Y., 462), to which I am referred by the learned counsel for the defendant.

In *Rexford agt. Rexford* (7 Lansing, 6) it was distinctly ruled that if declarations made by the husband to his wife are relied upon to establish duress sufficient to invalidate a conveyance made by her, they should be of a character to show beyond any question that she acted under an apprehension of personal injury or grievous wrong, and that his declaration that unless she signed the deed "she should not live with him in peace," was not sufficient to invalidate the deed.

In *Lord agt. Lindsay* (18 Hun, 484), *Rexford agt. Rexford* is approved, and the court says that the duress and coercion, to avail as a defense to a mortgage executed by a wife upon her separate estate to secure her husband's debt, "must go to the

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extent of depriving the party of her free volition by reason of personal injury or great wrong."

In the case of *Barry agt. Equitable Life Insurance Company* (59 N. Y., 587), while duress was found by the court below to have been exercised by the husband, it also appeared that the instrument sought to be impeached was obtained by the husband from his wife by false representations and was used to secure an antecedent obligation. It also appeared that the wife did not fully understand the nature of the instrument she was signing, and that her assent was not voluntary.

Duress in a more extended sense may mean a degree of severity "either threatened or actually inflicted," which is sufficient "to overcome the mind and will of a person of ordinary firmness" (*Abbott's Law Dictionary*, title "Duress"). And there may be cases in which a party would be entitled to relief against a contract where it is made under "the influence of extreme terror, or of threats, or of apprehensions, short of duress" (*Story Equity Jurisprudence*, sec. 239), and circumstances of "extreme necessity and distress of the party" may be sufficient "to overcome his free agency." A case of that description was *Eadie agt. Slimmon* (26 N. Y., 1), where a wife was terrified by a creditor of her husband into the execution of a transfer of her separate property by threats of his prosecution for an alleged embezzlement.

There is sufficient in the case to satisfy me that the wife thoroughly understood the transaction, and that in the end she gave her consent to it. Her action was voluntary. Doubtless she would have preferred not to have encumbered her separate estate, and she may have regretted that there was any occasion for it. But the threats to which she has testified and the urgency of her husband was not of a nature to prevent the exercise of her reason, judgment and free will. She had ample opportunity before giving her final consent and carrying the same into execution to reflect upon the matter, and if she needed advice to consult with her friends. She went the next day, after the interview with her husband, to the office of the

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attorney who prepared the mortgage, and remained there some time, her husband not being present, while the papers were being prepared. She exhibited no hesitancy or timidity. Her manner was composed. She then met the plaintiff and his agents, who were present, to advance the money and close the transaction. She gave no intimation that the mortgage was not voluntarily made by her.

If her case otherwise had strength it is here weak. If she had any occasion to feel that she was yielding to the urgency or constraint of her husband's necessities and influence, it was her duty to have given the plaintiff some information as to the state of her mind upon the subject, and not to have allowed him to loan his moneys under the belief that she was acting freely and uninfluenced by her husband. There is no equity in the defendant's position superior to that of the plaintiff, who acted *bona fide*. The defendant declared to the notary public that she was acting freely, and signed an order for the payment of the sum loaned on the mortgage to her husband, who received a check for the amount in her presence. What he did with the proceeds does not appear.

There is no defense to this mortgage, and there must be judgment of foreclosure and sale.

SUPREME COURT.

LOUISA BERRIGAN agt. ALLISON OVIATT.

Pleadings—Action upon promissory note when answer bad.

Where the complaint was on a promissory note given by defendant to plaintiff and verified in the personal knowledge of the plaintiff and the answer verified in the usual form : (1) denied the indebtedness for which note was given, or that plaintiff presented note for payment : (2) upon information and belief denies the giving of note mentioned in complaint or any note ; that if plaintiff has such note it was obtained by fraud, &c., while defend-

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ant was intoxicated. The plaintiff presented affidavits showing that the transactions were in the personal knowledge of the parties and that the answer was false. These questions were not disputed by defendant: *Held*, that the answer was bad; the first defense being clearly frivolous, and the second defense being in the alternative and relating to personal transactions between plaintiff and defendant, and the allegations denying them being on information and belief does not create an issue and is sham.

Cattaraugus Special Term, February, 1886.

THIS was a motion to strike out answer of defendant as "sham and for such other and further order as to the court shall seem just."

The complaint was on a promissory note for fifty dollars given by the defendant to plaintiff and verified in the personal knowledge of the plaintiff.

The answer was in two separate parts.

The first answer denied the indebtedness for which note was given, or that plaintiff presented note for payment.

The second defense is upon information and belief, and denied the giving of note mentioned in complaint, or any note of fifty dollars; that if plaintiff has such note in her possession, or any such note, it was obtained by fraud, &c., while defendant was intoxicated.

The answer was verified in the usual form.

The plaintiff presented affidavits showing that the transactions were in the personal knowledge of the parties, and that the answer was false.

The defendant did not dispute any of these questions.

Thomas Storrs, for the motion. 1. The first allegation in the defendant's answer does not deny any material allegation in the complaint and is clearly frivolous and should be overruled. 2. The second answer is bad. It is in the alternative, and the allegations relate to personal transactions between the parties hereto, and an allegation denying them on information and belief does not create an issue. "The answer of the defendant

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must contain first a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." The defendant has personal knowledge of the matters in the complaint, and his knowledge has swallowed up his belief, and he can no longer allege on information and belief (*Code Civ. Pro.*, § 500; *Sherman agt. Boehm*, 15 *Abb. N. C.*, 254; *Edwards agt. Lent*, 8 *How.*, 28; *Ketcham agt. Zerega*, 1 *E. D. S.*, 554). A sham answer is one that is false (*Thompson et al. agt. The Erie R. R. Co.*, 45 *N. Y.*, 468).

George H. Phelps, for defendant, opposed the motion. The motion should be denied, for some material allegations in the complaint are in issue by answer.

CHILDS, J.—The answer is bad. The first defense is clearly frivolous. The second defense is in the alternative, and relates to personal transactions between plaintiff and defendant. No affidavits on the part of defendant denied this statement, while the plaintiff presented affidavits showing the answer false in every particular.

The motion should be granted overruling the first defense as frivolous and striking out the answer and the whole thereof as sham, but with leave to the defendant to serve a new answer in ten days after this order is served on him on payment of ten dollars costs of this motion, and that if the defendant fail so to do that the plaintiff have judgment thereon for the relief demanded in the complaint, with costs of this action, and ten dollars costs of this motion.

Van Horne agt. Campbell.

COURT OF APPEALS.

VAN HORNE, individually and as executor, agt. CAMPBELL and another.

Appeal—Motion for reargument in court of appeals—Discretion of general term—Evidence in trial court—Evidence not appearing in judge's minutes.

Where by the evidence it appeared that plaintiff might have been entitled to receive an undivided portion of the property to which he claimed the whole title, and to which the trial court gave him entire title, it was in the discretion of the general term to modify the verdict, or reverse it and send the case back for a new trial; and where the general term has exercised such discretion this court cannot review its action, and a motion for a reargument on such a ground will be denied.

The only way in which to justify such a finding would be to look into the evidence, and as the trial court took the case from the jury, and made findings of fact in which no such title to part appears, it cannot be considered here.

Decided, December, 1885.

N. J. Parker, for appellant.

Horace E. Smith, for respondents.

ANDREWS, J. — There are insuperable difficulties in the way of granting this motion:

First. The plaintiff in his complaint claims title in fee to the whole premises. He recovered judgment in accordance with his claim. The general term reversed the judgment, and ordered a new trial, on the ground that the devise over in the will of Jellis Fonda, upon which the plaintiff's claim to the whole title rested, was void, and the judgment of the general term has been affirmed by this court. It is now claimed that the general term, instead of reversing the judgment absolutely, should have modi-

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fied it by awarding a recovery for the undivided sixth part of the premises, as to which the plaintiff claims her title is unimpeachable. Assuming that the evidence conclusively established title in the plaintiff to this extent, the general term was not bound to modify the judgment and award a recovery for the sixth part of the premises. It was in the discretion of the general term either to modify the judgment or to reverse it absolutely, and leave the plaintiff, on a new trial, to assert his claim to an undivided share, and procure judgment therefor. This court cannot review the discretion of the general term (*Godfrey agt. Moser*, 66 N. Y., 250).

Second. The facts upon which the right of the plaintiff is based to recover an undivided share of the premises are not found by the trial judge. The action was tried before the court, without a jury, and the findings upon the question of title relate solely to the claim of title under the devise over in the will of Jellis Fonda. It is only by looking into the evidence that the right of the plaintiff to a share of the premises, by another and independent title, could have been ascertained. But an examination of the evidence would not have disclosed an indisputable title in plaintiff to the one-sixth part. The original share which descended to his mother, a daughter of Douw Fonda, was one undivided fourth part, of which the plaintiff was entitled to an undivided one-eighth part only. His title to any greater interest depends upon the assumption that Mrs. Wemple's share of her father's estate descended to her heirs, and that, as to that share, the defendants have not acquired a title by adverse possession. This assumption is not, upon the evidence, incontrovertible. The defendants are at least entitled to be heard upon that question.

The motion should be denied.

All concur, except MILLER, J., absent.

Wright agt. Bank of the Metropolis.

SUPREME COURT.

HENRIETTA H. WRIGHT, respondent, agt. THE BANK OF THE
METROPOLIS, appellant.

*Damages—Stock—Conversion—Rule of damages in an action for conversion
of stock—Question of fact for jury.*

In an action for the conversion of certain stocks taken by the defendant as collateral security and wrongfully sold and converted, the plaintiff is not entitled to recover the highest price of the stocks between the time of the conversion and the day of the trial.

The true rule of damages is their highest market value between the date of the conversion and a *reasonable time*.

What is a *reasonable time*, is a question of fact for the jury.

If the plaintiff, within a reasonable time after knowledge of the conversion of her stocks, had gone into the market and purchased an equivalent of the stock converted by the defendant, the price she would have paid would have been the true measure of damages.

Where she voluntarily omits to buy back her stocks she, by her omission, takes upon herself the hazard of the fluctuations of the market, and she will not be permitted to visit upon defendant losses sustained by her omission.

Fourth Department, General Term, January, 1885.

BEFORE HARDIN, P. J., BOARDMAN and FOLLETT, JJ.

ACTION for conversion of stocks owned by Benjamin H. Wright. Plaintiff was substituted.

Stocks pledged to a note of \$2,000 January 14, 1878, tender of payment of note and demand and refusal to deliver 9th of May, 1878, as alleged, and action commenced October 8, 1879.

At the first trial, April 5, 1881, court ordered verdict for \$15,547.43. There was an appeal and reversal, court holding question should have been submitted to jury, and the last trial was the 24th of October, 1883. Verdict, \$3,891.25.

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John Delehanty, for appellant.

W. E. Scripture, for respondent.

HARDIN, *P. J.*—Defendant asked for a new trial and its motion was denied. Plaintiff asked for a new trial and her motion was granted.

Defendant appeals from both orders. Plaintiff does not appeal.

Whether there should be a new trial depends upon an inquiry, as to whether the court applied on the trial the true rule of damages.

This was an action for the conversion of certain stocks taken by the defendant as collateral and wrongfully sold and converted.

Plaintiff tendered payment of the debt, for the security of which her stocks were pledged, and demanded her stocks. Defendant refused, and the verdict establishes that the defendant had wrongfully converted the stocks, and wrongfully refused to deliver them upon the demand of plaintiff. Substantially the case made by plaintiff, for the conversion was like the case of *Romaine* agt. *Van Allen* (26 N. Y., 309).

Plaintiff's contention now is that she is "entitled to recover as damages the highest market value of the stocks, that they may reach from the time of conversion to the time of trial."

The court charged the jury, "that if you find for the plaintiff he is entitled to recover the highest price at which these stocks could be sold in the regular open market, their highest market value between the date of their actual conversion and a reasonable time, and you are to fix it, not arbitrarily and not through sympathy or prejudice, *but* are to say what, under *all the* circumstances, would be a reasonable time within which to commence this action and also it may be reasonable diligence in prosecuting it."

Also, "that if the jury find for the plaintiff, their verdict should be rendered in the difference between the amount of

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the \$2,000 check for which the stock was pledged and the highest value of said stock within a reasonable time after the conversion of the stock, with legal interest on said difference to the date of the verdict."

Also, "I submit to you as a question of fact, what is a *reasonable time*?"

Defendant insisted that the court should decide as matter of law, what would be a reasonable time, but the court declined, as there was evidence bearing upon the question.

We are of the opinion that the plaintiff's contention for the highest price of the stocks up to the day of trial, is not sustained by the later authorities upon the question (*Mathews agt. Coe*, 49 *N. Y.*, 62; *Baker agt. Drake*, 53 *id.*, 211; *Baker agt. Drake*, 66 *id.*, 518; *Greenman agt. Smith*, 81 *id.*, 27; *Coll agt. Owens*, 90 *id.*, 371; *Porter agt. Wasmer*, 18 *Week. Dig.*, 346; *Page agt. Fowler*, 39 *Cal.*, 412; *Pinkerton agt. M. and L. R. R. Co.*, 42 *N. H.*, 424; *Sturges agt. Keath*, 57 *Ill.*, 451; *M. and T. Bank agt. F. and M. N. Bank*, 60 *N. Y.*, 40; *Whelan agt. Lynch*, *id.*, 469).

If the plaintiff, within a reasonable time after knowledge of the conversion of her stocks, had gone into the market and purchased an equivalent of the stock converted by defendant, the price he would have paid would have been, we must assume, the same as the verdict which he has recovered.

We think, therefore, that the instruction given authorized the jury to give, as we assume they did give the plaintiff such sum as measured the damages sustained by him, for which the defendant became liable by reason of its wrongful conversion of the stocks in question.

There is no evidence in the case that would have warranted punitive damages.

Defendant mistakenly supposed it had a right to sell the stocks (*Hamilton agt. Third Avenue R. R. Co.*, 53 *N. Y.*, 25).

Plaintiff has, in the verdict, a compensation for the wrong done by the defendant.

Her omission to buy back her stocks was voluntary, and she

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ought not visit upon the defendant losses sustained by her omission to take upon herself the hazard of the fluctuations of the market as to the stocks in question (*White agt. Fuller*, 67 *Barb.*, 267; *Worth agt. Edmunds*, 52 *id.*, 40; *Dillon agt. Armstrong*, 43 *N. Y.*, 231).

If the foregoing views prevail, the order denying defendant's motion for a new trial should be affirmed and the order granting plaintiff's motion for a new trial should be reversed with one bill of costs to respondent, plaintiff, and judgment should be ordered for the plaintiff upon the verdict, with costs.

BOARDMAN and FOLLETT, JJ., concur.

SUPREME COURT.

JAMES J. NEALIS, receiver, agt. HENRY ADLER *et al.*

Partnership—Rights of partners.

The firm of A. & S. being indebted to B. on over due notes for money loaned, and to C. on notes not due for loans, A. without his partner's knowledge, in order to enable suit to be brought on these claims, in the city court, gave the firm's notes, maturing in a few days, to B. and to C., who thereupon began suit upon them. The summons was served only upon A., who made no defense, and judgment was entered by default: *Held*, that these judgments are not fraudulent as against creditors.

Special Term, February, 1886.

THE firm of Adler & Schoenhof were indebted to one Herman Adler upon a note of the firm held by him, and to one Solomon Bachman for moneys loaned by him to the firm. The note held by Herman Adler was for \$4,778.61, and was over-due. The defendant, Henry Adler, desiring to secure Herman Adler and Solomon Bachman, gave to the former three firm notes aggregating the amount of said note held by him, and took up the latter. The defendant, Henry Adler, at the same

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time gave to Solomon Bachman three new firm notes aggregating in amount the sum of the loan to the firm by him, but which new notes matured in a few days after their date. On their maturity Herman Adler and Solomon Bachman respectively began separate actions against said Adler & Schoenhof in the city court, based on the said notes, serving the summons in such actions on defendant, Henry Adler, only. He made no defense, and judgments were thereupon entered against the firm in all of said actions. The defendant, Schoenhof, thereupon brought suit against his copartner, Henry Adler, for a dissolution of their firm, and the plaintiff, Nealis, was by consent appointed receiver of the firm's property. The plaintiff thereupon brought this suit to set aside the said judgments as fraudulent and void as against the firm's creditors.

Blumenstiel & Thomas, for plaintiff, receiver.

Mr. Jelliffe, for defendant, Schoenhof.

Stern & Myers, for defendants, Adler *et al.*

VAN BRUNT, J.—This is an action to set aside certain judgments obtained by the defendants, Herman Adler and Solomon Bachman, against the defendants, Henry Adler and Jacob Schoenhof, brought by the plaintiff as receiver of the copartnership assets of said Adler & Schoenhof.

In considering the only question which was reserved for consideration upon the trial, I shall assume, as found as matter of fact, that the debt to Herman Adler was a debt of the firm of Adler & Schoenhof.

The point now to be determined is whether or not the judgments obtained by Herman Adler are voidable because of fraud.

The right of one partner to sell, pledge, mortgage or otherwise dispose of any of the copartnership property or assets for the purpose of securing a copartnership debt, even against the wishes of a copartner, seems to have been established in this

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State since the case of *Mabbett agt. White* (12 N. Y.). It is true that if the act is done with a fraudulent intent, it is voidable by a party injured, and the discussion has always been as to what established a fraudulent intent.

It is not fraudulent for a partner to secure by mortgage, pledge or otherwise, one or more of the creditors of the firm, although such action may diminish the security of other creditors, and it is not fraudulent for one partner to do this not only without the knowledge of a copartner, but even knowing he would be opposed to the giving of such security (*Mabbett agt. White, supra*). Neither is it fraudulent for a creditor to seek to obtain such security from one of the partners of the firm which is indebted. Such being the case, a creditor has the right to get security by all legal resources, and a partner has a right to give such security. He is prohibited by statute, however, from giving security in one way—viz: by confession of judgment—but this seems to be the only method which has been prohibited.

The firm of Adler & Schoenhof were indebted to Herman Adler and in order to enable suit to be brought on this claim in the city court, Henry Adler gave these notes for this debt, which he had a perfect right to do.

It would not have been any defense to an action brought upon these notes in the city court for Jacob Schoenhof to have answered that Henry Adler had given these notes for a firm debt in order to enable suit to be brought thereon in the city court.

Henry Adler had the right to secure to Herman Adler his debt. He had a right to issue notes for the same in any legal form as long as the intent was simply to secure a debt of the firm. Such being the case, how is fraud to be predicated upon the fact that Schoenhof was purposely kept in ignorance of the bringing of the actions? If Henry Adler had the right to secure this debt without the knowledge or against the wishes of his partner, as is held in the case of *Mabbett agt. White*, he did

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nothing more in the carrying out of the plan by which the judgments in question were obtained.

As long as preferment of debts by way of sale, mortgage, pledge, &c., of copartnership property is legal by a partner of a firm in insolvent circumstances, an action tending to that end, taken solely for that purpose, cannot be held to be fraudulent.

As to the judgments obtained by Mr. Bachman, I do not see that the fact that the debt was not actually due, in any way affected the right of the copartner to secure the same.

The liability was a debt, although not due (*Leggett agt. Hunter, 7 N. Y.*), and this means was taken to secure Mr. Bachman for his liability. As has been heretofore said, Bachman had a right to seek security, and Adler had a right to give it to him; as long as the only intent was to secure a liability of the firm.

I am of the opinion, therefore, that the judgments are not fraudulent as against creditors, and that the plaintiff's complaint should be dismissed, with costs.

COURT OF APPEALS.

PEOPLE *ex rel.* WALKILL VALLEY RAILROAD COMPANY agt.
KETOR and others, assessors, &c.

Appeal—Limit of time—Laws 1880, chapter 269—Code of Civil Procedure, section 1825—Proper notice—Supreme court rule 2.

The time in which an appeal from a decision of the general term, affirming a reduction of assessment made by the special term upon a *certiorari* brought under Laws of 1880, chapter 269, is regulated by section 7 of that law, and not by section 1825 of the Code of Civil Procedure, and such appeal *must* be taken within sixty days after service of a copy of judgment on appellant's attorney.

Where the address of the attorney was omitted from the notice of entry, &c., on the copy of a general term order served, but the copy of judgment for costs served on appellant's attorney was indorsed with the address of

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relator's attorney, and also with a notice that the paper served was a copy of a judgment of affirmance, with costs, and giving the date and place of its entry:

Held, to be a proper notice under rule 2.

Decided December, 1885.

Peter Cantine, for appellants.

A. T. Clearwater, for respondents.

EARL, J.—This is a motion to dismiss an appeal to this court, on the ground that it was not taken within the time prescribed by law. The relator, conceiving itself aggrieved by the assessments made by the defendants, as assessors of the town of Rosendale, Ulster county, procured a writ of *certiorari* to review the assessment under the act, chapter 269, of the Laws of 1880. Upon the return of the writ, a hearing was had at the special term, where the assessment was reduced. The defendants then appealed to the general term, where the decision of the special term was affirmed, and a judgment of affirmance was entered on the 22d day of July, 1885, and notice thereof was given to the attorney for the defendants on the same day. From that judgment the defendants appealed to this court, on the 20th day of November, 1885.

The defendants claim that their time to appeal was limited only by section 1325 of the Code of Civil Procedure, under which, if applicable, they had the right to appeal at any time within one year after the judgment was entered. The relator claims, however, that the appeal was regulated by section 7 of the chapter above referred to, which provides that "appeal may be taken by either party from an order, judgment, or determination under this act, as from an order, and shall be heard and determined in like manner," and hence that the appeal should have been taken to this court within sixty days after service upon the attorney for the appellants of a copy of the judgment appealed from and a written notice of the entry

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thereof. We think the contention of the relator is right, and that the motion should be granted.

Chapter 269 provides a new and complete system for reviewing, upon *certiorari*, and correcting errors of assessors; and all the provisions of the act show that it was the intention of the legislature that the proceedings should be speedily conducted and speedily brought to a termination. Section 8 provides that the assessment roll shall be finally completed and filed, and notice thereof given on or before September 1, in each year; and section 2 provides that the writ shall not be granted unless application therefor shall be made within fifteen days after the completion and delivery of the assessment roll, and notice thereof given as provided in the act; that the writ shall not stay the proceedings of the assessors or other officers to whom it is directed, or to whom the assessment roll may be delivered to be acted upon according to law. Section 3 provides that the justice granting the writ shall prescribe in the writ the time within which a return thereto must be made, which shall not be less than ten days. Section 7 provides that all issues and appeals in any proceedings instituted under the act shall have preference over all other civil actions and proceedings in all courts. Section 8 provides that if final judgment shall not be given in time to enable assessors or other officers to make a new or corrected assessment for the use of the board of supervisors at their annual session, and it shall appear from the judgment that the assessment was illegal, erroneous, or unequal, then there shall be audited and allowed to the petitioner, and included in the next year's tax levy, and paid to the petitioner, the amount, with interest thereon, in excess of what the tax should have been as determined by the judgment.

It was undoubtedly expected by the law-makers that, as the writ was required to be procured in September, the proceeding would be brought to a determination in time for the action of the supervisors at their succeeding annual meeting, and such must generally be the result. The provisions of section 7 accomplish three things: (1) That all issues and appeals

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instituted under the act shall have preference over all other civil actions and proceedings in all courts; (2) that every final decision under the act, for the purpose of appeal, shall be treated as an order, and hence that an appeal to this court shall be placed on the order calendar, and not be subject to the delay which might occur if it were required to be placed upon the general calendar; and (3) appeals to this court must be within the time specified for appeals from orders, to wit, sixty days, rather than one year. The provision is that appeal may be taken as from an order, and shall be heard and determined as an appeal from an order. We do not think that this is merely permissive, and that an appellant has the option to appeal either under the Code or under the section named. The provision is a part of the whole scheme, and was intended to provide the precise way in which an order, judgment or determination under that act could be reviewed. If that section is not to receive this construction, then great delay might ensue from the decision of the general term. The appellant might wait a year before bringing his appeal, and then some time might elapse before it could get upon the calendar of this court so as to entitle it to the preference given by that section. We think the plain purpose of the act, as well as public convenience, requires that we should give the construction contended for by the counsel for the relator.

It was, however, claimed, on the part of the appellants, that their time to appeal was not limited by a proper notice. The counsel for the relator served upon the appellants a copy of the order of the general term, affirming the decision of the special term, with a notice on the back thereof stating that it was a copy of the order, and when and where it was filed and entered. That notice was signed, "P. Cantine, attorney for respondents," without in any way indicating his post-office address or place of business. In pursuance of the order of the general term, the relator's costs were taxed, and a formal judgment of affirmance and for costs was entered on the 22d day of July, and a copy of that judgment was served upon the appellants' attorney, and

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on the back of it was indorsed the title of the cause, and "P. Cantine, attorney for respondents, office and post-office address, Saugerties, Ulster Co., N. Y.;" and below that, signed by the same attorney, without his post-office and business addresses, was a notice stating that the paper served was a copy of a judgment of affirmance, with costs, and giving the date and place of its entry in the clerk's office of Ulster county. The judgment referred to in that notice was the judgment appealed from; and if rule 2 of the general rules of practice of the supreme court applies to an appeal to this court, the motion was a full and precise compliance with that rule, because it was indorsed on the back with the name of the attorney, with his post-office and business address. The notice was therefor sufficient to limit the appellants' time for appeal, and the appeal not having been brought within sixty days, the time prescribed for an appeal from an order to this court, it was too late, and it should be dismissed, with costs.

All concur.

SUPREME COURT.

THOMAS H. STRINGHAM agt. CORNELIA M. STEWART.

Undertaking on appeal — Disqualification of attorneys as sureties.

Rule 5 of the General Rules of Practice which provides, that an attorney and counselor shall not be surety on any undertaking or bond, does not apply to a person whose name still appears on the roll of attorneys, but who abandoned the practice of the law many years ago to engage in another occupation, in which he still continues.

Kings County, Special Term, March, 1886.

Mr. Johnson for plaintiff.

Henry H. Rice, for defendant.

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BARTLETT, J.—The plaintiff objects to the defendant's undertaking on appeal in this case, on the ground that Henry Hilton, one of the sureties named therein, is an attorney.

In answer to this objection the defendant files an affidavit showing that the proposed surety relinquished the practice of the law upwards of fourteen years ago and has been engaged in other business ever since.

Rule 5 of the General Rules of Practice provides as follows: "In no case shall an attorney or counselor be surety on any undertaking or bond required by law or by these rules, or by any order of a court or judge, in any action or proceeding, or be bail in any civil or criminal case or proceeding."

The question now presented is whether this rule applies to a person whose name still appears on the roll of attorneys, but who abandoned the practice of the law many years ago to engage in another occupation, in which he still continues.

I do not think it does. The general term of the New York superior court held, in 1881, that the rule did not preclude an attorney who had left the law for another vocation more than a year before from becoming a surety on an undertaking in attachment (*Evans agt. Harris*, 47 N. Y. Super., 366). This decision is criticised on the ground that the English cases referred to in the opinion of the court do not sustain the propositions they are cited to support. However this may be, I think the conclusion reached by the superior court is fully warranted by reference to the reason which led to the establishment of the rule.

The disqualification of attorneys to become bail is derived from the English practice, and all the authorities agree that it had its origin in the desire to protect attorneys against the importunities of their clients.

Mr. Tidd, in his celebrated work on the practice of the court of king's bench, expressly declares that the rule was calculated for the benefit of attorneys (1 *Tidd's Prac.*, 230), and the language of the court is to the same effect in the case of *Dixon agt. Edwards* (2 *Anstruther*, 356).

Plainly the reason thus assigned can have no existence in the

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case of an attorney who has abandoned his vocation as such. A lawyer who has become a merchant is in no danger of being importuned by clients, for he gives up his clients when he gives up the law. If the construction now contended for were adopted, it would forever disqualify every person admitted to the bar so long as his name appeared upon the roll of attorneys, although he might have studied law only with reference to the advantages it would give him in the conduct of his affairs as a business man, and might never have gone into court in his life, except when he was sworn in as an attorney.

There is an intimation in a single case decided in New York, at chambers (*Wheeler agt. Wilcox*, 7 Abb. Pr., 73), that in order to remove the disqualification established by the rule, the proper course is for the attorney to procure his name to be stricken from the roll. While this course would seem to be essential in the case of a practicing attorney, I do not regard it as necessary under such circumstances as are presented here. I do not think the words "attorney or counselor" in rule 5 were intended to relate to an attorney or counselor who has permanently abandoned the practice of the law and taken up some other pursuit. Such clearly appears to be the case with ex-judge HILTON.

The objection to the undertaking is, therefore, overruled.

SUPREME COURT.

RALPH L. ANDERTON, Jr., and others, agt. RUDOLPH ARONSON,
NEW YORK CONCERT COMPANY (limited) and others.

Corporation—When stockholder may maintain action against a corporation to restrain wrongful acts and for an accounting—What is necessary to be alleged or shown to entitle him to maintain such action—Effect of the presence of a director at a meeting of the board on matters which relate to his individual interest.

The general rule seems to be that in an action brought by a stockholder to restrain alleged wrongful acts of the corporation it must be averred and

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shown that the corporation has on proper application for that purpose refused to bring any suit, or to take any proper steps for the redress of those grievances.

In this case it is not claimed that any demand has been made by the plaintiff upon the board of directors to bring the action, but it is alleged in the complaint that "inasmuch as the defendant A. controls a majority of the board of directors, who are friendly to him, and aid and assist him in his illegal acts, and without whose consent or direction this action cannot be brought, this suit has been commenced by the plaintiff, and the said corporation is made a party defendant":

Held, that under the peculiar circumstances of this case the plaintiff has a standing in court and a right to maintain this action.

The mere presence of a director or president of a corporation at a meeting of the board of directors vitiates the action of such board in respect to all matters which relate to his individual interest, unless such action be subsequently ratified by the stockholders.

Special Term, February, 1886.

A. J. Dittenhoefer, for plaintiffs.

William H. Arnoux, David Leventritt and Franklin Bien, for defendants.

LAWRENCE, J.—When this action was before the general term on the appeal taken from the order denying the continuance of the temporary injunction, theretofore granted, the order at the special term was affirmed.

The presiding justice who delivered the opinion of the court then said, that "there is much room for doubt whether the plaintiff, in respect to several of his alleged grounds of relief, is at liberty to maintain this action without first showing that the corporation has, on proper application for that purpose, refused to bring any suit, or to take any proper steps for the redress of those grievances."

One of the first questions now to be considered is whether the plaintiff has established a right to maintain this action.

It was held by the court of appeals in *Greaves agt. Gouge* (69 N. Y., 154), that an action against an officer of a corporation to

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recover damages for a fraudulent misappropriation and conversion by him of the corporate property, can only be brought by a stockholder in his own name after application to and a refusal upon the part of the corporation to bring the action. The same doctrine was also enunciated in *Robinson agt. Smith* (3 Paige, 222, 223). And in the case of *Leslie agt. Lorillard et al.* (81 Hun, 305), the general term of this department said, in an action brought by a stockholder to restrain alleged wrongful acts of the corporation, that "the complaint does not sufficiently aver that the corporation * * * has refused to bring an action to redress the alleged wrongs of its officers in such manner as to entitle the plaintiff to maintain this action as a stockholder of that corporation. To give him that right the stockholder must aver that the corporation has refused to bring the action." And further on in the opinion it is stated that "the refusal of the board of directors in such a case is essential in order to give the stockholder any standing in court, as the charter confers upon the directors the general management of the business of the company."

In *Hawes agt. Oakland* (104 U. S. Rep., 460), a very strong opinion is rendered to the same effect. In *Brinckerhoff agt. Boswick* (88 N. Y., 52), which was an action brought by a stockholder in behalf of all the other stockholders against the receiver of a national bank, and the directors thereof, to recover the damages alleged to have been sustained by the stockholders through the gross negligence and inattention to the duties of their trust by said directors; it being alleged that the receiver was himself one of the directors chargeable with such neglect of duty, RAPALLO, J., said: "For these losses the bank, if still exercising its corporate functions, would have a claim upon the guilty directors, which it could enforce by action. But if it refused to prosecute, or if it still remained under the control of the very directors against whom the action should be brought, the stockholders would have a standing in a court of equity to sue in their own names, making the corporation a party defendant."

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In this case it is not claimed that any demand has been made by the plaintiff upon the board of directors to bring the action. The allegation in respect to that matter is contained in the sixty-fourth paragraph of the complaint, which alleges that "inasmuch as the defendant Aronson controls a majority of the board of directors, who are friendly to him, and aid and assist him in his illegal acts, and without whose consent or direction this action cannot be brought, this suit has been commenced by the plaintiff, and the said corporation, the New York Concert Company (limited), is made a party defendant."

That allegation is denied in the sixty-fourth paragraph of the answer of Rudolph Aronson, Albert Aronson and the New York Concert Company (limited), and no direct proof was given to substantiate it, the fact of the defendant, Rudolph Aronson, possessing such control, resting upon inferences, to be drawn from the general proofs which were offered in regard to the proceedings of the several boards of directors, which are the subject of investigation in this action. Although the facts were much more clearly developed upon the trial than they were in the affidavits upon which the injunction was claimed, still the main facts proven upon the trial were before the court on that application. And as the appellate branch of this court, while intimating grave doubts as to the ability of the plaintiff to maintain this action, did not go so far as to deny that he might be entitled to some relief, and as I am of the opinion that the just and fair inference to be drawn from the evidence is, that an application to the corporation to bring an action would have been of no avail, for the reason that the majority of the directors were friendly to Rudolph Aronson, I think it should be held that the plaintiff has a standing in court. I am strengthened in this opinion after reading the decision of the court of appeals in *Barr agt. The New York, Lake Erie and Western Railroad Company* (96 N. Y., 444, 450), which seems to be the most recent case in that court upon this subject. This case has been most thoroughly tried, and counsel have filed very elaborate and instructive briefs. Under such circumstances, unless con-

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strained by the most controlling authority, I do not think that I should decline to consider it upon its merits. It was urged that so far as this action relates to the 200 shares of stock, originally issued to Rudolph Aronson, the plaintiff has no standing in court, inasmuch as it appears that such stock was directed to be issued to him, either at the first meeting held in September, 1881, or shortly thereafter, and that the plaintiff did not purchase his stock until the 14th of June, 1882.

The authorities upon this point in this state seem to be conflicting. In *Young agt. Drake and others* (8 Hun, 61), GILBERT, J., in delivering the opinion of the court, after holding that the stockholder might maintain the action, because it had been shown that the corporation was still controlled by the same trustees, who were accused of the fraud, or where such accused persons are a majority of the trustees, goes on to say: "It is enough that the plaintiff was a stockholder when the action was brought. If he purchased his stock after the alleged fraud was committed, that did not condone the fraud. The plaintiff acquired all the rights of the person of whom he purchased"; and he cites the case of *Ramsey agt. Gould* (57 Barb., 398), as an authority for that proposition.

On the other hand, in the case of *Patterson agt. Baker* (6 T. & A., 76), which was an action brought by the holder of circulating notes of a bank against a director for damages by reason of the notes having been rendered worthless by the acts of the defendant and the other directors, it was held that the complaint was demurrable, because it did not show that the acts occurred subsequent to the plaintiff's acquisition of the notes.

To the same effect is the case of *Butt agt. Cameron* (53 Barb., 642).

In this case the plaintiff did not acquire the title to his stock until June 14, 1882. The precise date of the acquisition of the stock is not stated in the complaint, the allegation being as before-stated, "that the plaintiff has owned and held the same (i. e., stock,) since about the time of the organization of the defendant corporation."

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I do not think that it is necessary for me to determine that question in view of the conclusion which I have reached in respect to that issue of stock, and I shall therefore proceed to consider the case so far as may be necessary upon the general merits presented by the testimony. It is well settled by numerous adjudications by the courts of this state and country, and the courts of England, that the relation existing between a director and a corporation is that of trustee and *cestui que trust* (see *Butts* agt. *Wood*, 37 N. Y., 817; *Cumberland Coal Co.* agt. *Sherman*, 30 Barb., 571; *Aberdeen Railway Co.* agt. *Blairie Bros.*, 1 Macqueen, 461; *Coleman* agt. *Second Av. Railroad Co.*, 38 N. Y., 201; *Duncomb* agt. *N. Y. H. and N. R. R. Co.*, 84 *id.*, 190; *Koehler* agt. *Black River Falls Iron Co.*, 2 Black, 715, 721).

And the cases also hold that whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be doubt that his character is fiduciary, being entrusted by others with powers, which are to be exercised for the common and general interests of the corporation, and not for his own private interests, and that he falls therefore within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability either partial or complete upon the party entrusted, to deal on his own behalf, in a matter involving such confidence (see opinion of FINCH, J., in *Duncomb* agt. *N. Y. H. and N. R. R. Co.*, 84 N. Y., 198, 199; see also *Hoyle* agt. *Plattsburgh and Montreal R. R. Co.*, 54 *id.*, 328; *Benson* agt. *Heathorn*, 1 *Younge & Collyer P.*, 326). It has also been held that the right of the corporation to avoid dealings by a director in his own behalf, in respect to matters involving his trust, does not depend upon the question whether he was acting fraudulently or in good faith (see *Duncomb* agt. *N. Y. H. and N. R. R. Co.*, 84 N. Y., 190, 199).

The law looks with jealous suspicion therefore upon any dealings between a director of a corporation and the corporation which may in any way result to the benefit or emolument of the former (see remarks of MILLER, J., in *Twin Lick Oil Co.* agt.

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Marbury, 91 U. S., 588, 589; *Hall agt. Vermont and Mass. R. R. Co.*, 28 Vt., 401).

In *Twin Lick Oil Co. agt. Marbury*, MILLER, J., in delivering the opinion of the court says: "That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others." After citing several cases, some of which have been above referred to, he continues: "The general doctrine, however, in regard to contracts of this class is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say this is the general rule, for there may be cases where such contracts would be void *ab initio*, as when an agent to sell, buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But even here acts which amount to a ratification by the principal may validate the sale."

The cases cited sufficiently indicate the delicacy of the position, in which a director or trustee stands towards the corporation, with which he is connected; but it is not every transaction which a director may have with the corporation which is necessarily void, and many of such transactions may be ratified by the concurrence of the shareholders of such corporation therein.

Morawetz in his work on Private Corporation (§ 390) says: "The managing agents of a corporation are generally inferior in authority to the majority at a stockholder's meeting."

"Hence an act of the managing agents may be in excess of their powers, and consequently a wrong to the corporation, and yet it may be within the powers of the majority, and the majority may have power to ratify the act on behalf of the corporation, and thus release the cause of action. It would obviously be improper under these circumstances to interfere at.

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the suit of a stockholder, for the majority acting within the powers conferred upon him, on behalf of the whole association, might afterwards at a corporate meeting ratify the unauthorized act, and thus destroy all claim for relief." And he refers to the case of *Foss agt. Harbottle* (2 *Hare*, 461), which was decided by vice-chancellor Wigram in 1843. In that case the plaintiffs alleged, that the defendants, who were directors of the corporation, had purchased their own lands of themselves, for the use of the company, and had paid for them, or rather taken to themselves out of the funds of the company, a price exceeding the value of the lands. The learned judge held that the transaction was unauthorized and might be set aside by the company, but that the majority at a meeting of the shareholders might ratify it on behalf of the corporation, and that, therefore, the court would not interfere. And he said: "Whilst the court may be declaring the acts complained of, to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting, may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be sustained, while that body retains its functions. In order then that this suit may be sustained, it must be shown either that there is no such power as I have supposed remaining in the proprietors, or at least that all means have been resorted to, and found ineffectual to set that body in motion."

(See, also, as to the power of ratification by corporations of the acts of directors, *Hotel Company agt. Wade*, 97 *U. S.*, 13; *Twin-Lick Oil Co. agt. Marbury*, 91 *id.*, 587; *Kent agt. Silver Mining Co.*, 78 *N. Y.*, 159, and *Van Cott agt. Van Brunt*, 82 *id.*, 535.)

Applying these principles to the case under consideration, I think it is too late now for the plaintiff to object to the regularity of the issue of the first 200 shares of stock on the 10th of

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September, 1881, to the defendant, Rudolph Aronson. It may well be doubted whether under the case of *Hall agt. Vermont and Mass. R. R. Co.* (28 Vt., 401), it would not have been competent for the trustees by an express resolution to have compensated Aronson by issuing that stock. Such action on their part might be regarded as equivalent to a subsequent promise to pay for services rendered by him in procuring subscriptions to the enterprise.

That case went upon the ground that the services there rendered had been voluntarily rendered, and that there had been no subsequent promise to pay for them. Also, that no previous promise could be implied, because at the time of the rendition of the services the defendant had no corporate existence. If Rudolph Aronson was present when action was taken, as to the 200 shares, the action of the directors would have been void, as will be seen from the authorities hereafter cited, but the weight of evidence is to the effect that he was absent, and I shall so find.

It seems to me, however, that the proceedings at the meeting in February, 1883, when the report of the Bloodgood committee was received and adopted, amounted to a ratification on the part of the stockholders of the action of the board of directors in issuing those 200 shares of stock, and that the regularity of such issue cannot now be questioned. There is evidence in the case showing that the subject of the 200 shares which had been issued to Rudolph Aronson, was discussed by the Bloodgood committee, and it was a subject which came fairly within the resolution under which that committee was appointed. I do not understand that it is claimed that a majority of the stock of the corporation was not represented at that meeting, and the evidence is conclusive that the report of the committee was adopted.

I have examined the evidence in regard to the alleged fraudulent alteration of the contract between Rudolph Aronson and the company, and am of the opinion that the explanation which was given on the part of the defendants, of the manner in which

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the words "eight years," instead of "five years," came to be first inserted therein is the true one. It certainly was not a business like mode of executing the contract to have such an important matter as the term thereof written over an erasure, but I cannot, on the weight of evidence, hold that the explanation which was given on the part of the defendants as to that matter is untrue. The contract itself, under the authorities before cited, is one which is to be looked upon with suspicion, but I am not prepared to say that it was one which the directors were entirely prohibited from making, if they deemed it for the best interests of the corporation to do so, and it certainly is not one which the stockholders were prohibited from ratifying. The case of *Hall agt. Vermont and Mass. R. R. Co.* (28 Vt., 401, 406) holds that for services rendered, subsequent to the incorporation, a director may be compensated, and that the board of directors may pass a resolution to that effect. It should be further observed that when this case was before the general term, the distinct point was made that the contract under which said stock was issued was void, for the reason that the directors had no power to appoint one of their own body as a manager and pay him a salary as such. If the learned counsel for the plaintiff was right in that contention, it would have disposed of the claim to profits, and also of Rudolph Aronson's alleged title to the 246 shares of stock issued to him in August, 1884, if the action of the directors was not subsequently ratified by the stockholders. In the case of *Van Cott agt. Van Brunt* (82 N. Y., 535, 541), a contract between the president and directors of a railroad company with a third party for the building of the road, was in accordance with a previous arrangement assigned to the president, and it was held, that as the contract was entered into in good faith, with the full approval of the stockholders, that the same would be enforced.

If it can be enforced upon the consent of the stockholders, a contract entered into without their previous consent, if subsequently ratified by them, can also be enforced.

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Many charges of fraud and bad faith on the part of the defendants are made in the complaint in this action, and evidence tending to substantiate them was given on this trial. The absence of the minute book, which contained important resolutions, was commented upon with much severity, but my examination of the testimony fails to convince me that the defendant Rudolph Aronson or the board of directors should be held responsible for its disappearance. The minute book seems to have been taken to the office of Grant & Ward, or to the Marine National Bank, and not to have been returned to the Casino. The assignee of Ward states that the minute book never came into his possession, although Mr. Caldwell testifies that he saw the minute book at the office of Grant & Ward between March and August, 1883, and afterwards in August at the Casino.

Albert Aronson swears that there were several meetings after August, and certainly one as late as December, 1883, held at the Marine National Bank, and that he last saw the minute book at the Marine Bank or at Grant & Ward's. Doty denies that the minute book was at Grant & Ward's office either before or at the time of their failure, in May, 1884, and says that he never saw the minute book there. On this evidence, I do not think it should be inferred that Aronson or the directors have fraudulently concealed the book.

For the same reason that I think the plaintiff is precluded from questioning the legality of the issue of the 200 shares of stock to Rudolph Aronson, I think he is also precluded from questioning the validity of the contract with him as general manager, as those matters were before the Bloodgood committee and were the subject of discussion. A favorable report was submitted by that committee, with full knowledge apparently of the existence of that, and that report was adopted by the stockholders at the meeting in February, 1883.

Assuming then, that the contract with Aronson was valid as having been approved by the stockholders, it follows that when the meeting of July 31, 1884, was held, he was entitled to the

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percentage of profits specified in the contract, in case any profits had been realized.

It was contended upon the trial that no profits had been made when the meeting of the 31st of July, 1884, was held. The board on that day adopted a resolution in which, after reciting that by the contract with Rudolph Aronson, he was entitled to one-half of the net profits which should be realized after deducting six per cent annually on the par value of the stock issued, and that there have been net profits up to March 10, 1884, which Mr. Aronson claims the books show to have been \$39,924.94, it was resolved: "That there be issued to Mr. Rudolph Aronson 100 shares of stock of this company at par, upon his giving to said company a receipt for \$5,000 on account of any amount found due to him."

It was also resolved: "That there be issued to Mr. S. J. O'Sullivan 210 shares of stock of this company at par, to be held by him in trust, to be paid in full, or so much as may be due, to Mr. Rudolph Aronson in the next succeeding resolution."

It was further resolved: "That Mr. Weber and Mr. Seligman be, and they are hereby appointed an auditing committee to ascertain and report to this board the amount which was due to Mr. Rudolph Aronson on said contract up to the 10th day of March, 1884, and that for such amount, or so much as said stock at par will pay Mr. O'Sullivan, transfer such stock so held by him in trust, and if there be an overplus of such stock, to return the same to the company."

One hundred shares were accordingly issued to Rudolph Aronson, and the remaining 210 shares were placed in the hands of Mr. O'Sullivan in trust, in accordance with said resolution. The evidence of Theodore Seligman is to the effect that he had made an examination of the books prior to the meeting of July 31, 1884, and that he had verified the statement given to him by Rudolph Aronson by such examination.

The amount of the profits claimed by Aronson to have been made up to that time was \$24,661.94, and the evidence shows

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that Mr. Seligman, the treasurer, found from the books that that amount was correct. The apparent amount of profit, according to Randall, was \$52,285.50. Mr. Randall was of the opinion that several items which had been charged to the construction account should properly have been charged to the expense account. But even if deductions from the amount of apparent profit on account of items fairly chargeable to the expense account should be made, it would seem that a profit of more than \$24,661.94 would remain, which would entitle Rudolph Aronson to a profit of \$12,330.97, or more than the par value of the stock actually allotted to him.

The testimony also seems to me to establish that whatever irregularities there may have been in the system of keeping the books of the Casino, such books were kept straight and honestly, although confusedly and irregularly.

I think the preponderance of the evidence is in favor of the defendants upon this point, and that as the contract with Rudolph Aronson must be held to have been ratified by the previous action of the stockholders, he would be entitled to receive the shares of stock which were awarded to him at the meetings of July 31st and August 16, 1884, and he, or his assigns, would have been entitled to vote thereon at the annual meetings on the 22d of September, 1884, if those meetings of the directors were properly held.

It appears from the minutes of the meeting of July 31, 1884, that there were present Rudolph Aronson, the president, in the chair, and Messrs. Fish, A. Aronson, Seligman, Weber, O'Sullivan, Doty and Myers. It does not appear that Rudolph Aronson abdicated the chair, nor that any of the proceedings were had without his presence. The same remark may be made as to the meeting of August 16, 1884. Rudolph Aronson presided at that meeting, and there were present Messrs. Seligman, O'Sullivan, Weber, A. Aronson and N. Myers.

The names of the parties who voted on the resolutions then adopted are not given.

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I am of the opinion that the presence of Rudolph Aronson at those meetings vitiated the action of the directors in respect to all matters which related to his individual interests. If authority is necessary for this conclusion, the able opinion of justice VAN BRUNT in the case of the *Metropolitan Elevated Railway Company* agt. *Manhattan Railway Company* (14 *Abbott New Cases*, 103, 293, 294), may be cited. In that case, the learned justice, after an elaborate review of numerous cases, at page 293, says: "The rule, therefore, seems to be clearly established that the question of minority cannot be considered in determining the right in equity to avoid a contract. The presence of one disqualified director is just as fatal to action which cannot be repudiated as the existence of a dozen. It being impossible to ascertain the amount of influence which each director exerts, or which he fails to exert in opposition to action in which he is interested, the only rule which can be adopted, or which can be applied with any certainty, is that if there is even one director who is disqualified, the whole action of the board is subject to repudiation" (*see also Butts* agt. *Wood*, 37 *N. Y.*, 317).

Unless, therefore, the action of the directors at those meetings has been ratified by the stockholders, the issue of the 246 shares of stock to Rudolph Aronson cannot be upheld by a court of equity.

The annual meeting of the stockholders was held on the 22d of September, 1884. The minutes show that at that meeting 2,900 out of 3,000 shares were represented, and that it was resolved, on motion of Mr. McCaull, that "a committee of five, consisting of Messrs. Roosevelt, Kemeys, Kohlsadt, Seligman and King, be appointed to examine the books and vouchers pertaining to the construction and management of the Casino, since its organization, and also the treasurer's report, and report to a meeting of the stockholders to be held November 11th, at four o'clock, at the Casino, and that said committee are authorized to employ an expert in the examination of the books of the company, and

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that all said books shall be open to them." Mr. Seligman declined to serve upon the committee, but the other gentlemen accepted, and on the 11th of November, 1884, submitted their report to the stockholders, in which they recommended a modification of the contract with Rudolph Aronson, so that instead of receiving one entire half of the net annual proceeds in addition to his salary, he will be entitled to one-half of such net proceeds, after the payment of the dividends, on the stock, as provided in such contract, but not to exceed the sum of \$6,000 in addition to his yearly salary, except, however, that if such profits shall exceed the \$6,000 of his salary, \$6,000 additional net profits to his share, six per cent dividends on the stock and \$6,000 for the share of the company, that then and thereafter he shall receive twenty per cent of such additional profits. The committee also recommended that in view of this action on his part the contract made heretofore with him, the division of profits, the issuing of stock to him therefor, and as promoter of the enterprise, and his management generally be approved, and that that said contract be extended two years beyond its present termination.

The committee also reported that no imputations should rest on any one, for the disappearance of the minute book, and sustained the issue of the stock made to Rudolph Aronson on October 19, 1881. They also reported upon the contract of September 10, 1881, and reached the conclusion which the court upon the trial has reached after hearing all the evidence, that the erasures therein contained were not made with intent to deceive. They also reported upon the issue of the stock on the 16th of August, 1884, and they submitted a resolution embodying their views, and recommending its adoption by the stockholders.

The report of the committee was adopted at this meeting. It does not appear, from the minutes of that meeting, *how many of the stockholders were present*. There seems to have been a very full attendance, and a very animated discussion as to the

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matters which came before the meeting, *but the number of shares represented is not given, and I am unable to determine, therefore, whether a majority of all the legal stockholders was present. A motion was made to ascertain whether a quorum was present, and it was put and declared to be lost.*

The plaintiff denies the regularity of the proceedings at that meeting, and claims that the resolution submitted by the committee was not adopted by a majority of the legal stockholders. Neither Aronson nor his assignee had a legal right to vote upon the 246 shares issued in August, 1884, because one of the questions before the meeting was, whether the issue of those shares should be approved of and ratified. - I cannot, therefore, say that the stockholders have ratified the action of the directors at the meetings of July 31st and of August 16, 1884.

The action of the stockholders' meeting of November 11, 1884, was, on the 19th of November, 1884, approved of at a meeting of the Board of Directors, but as Rudolph Aronson was present, and there would have been no quorum without his presence, the action taken at that meeting does not aid the defendants in this case (*Butts agt. Woods*, 37 N. Y., 317, and opinion of VAN BRUNT, J., in the *Elevated Railway Cases*).

For the reasons above stated, I am of the opinion that the action of the directors of the New York Concert Company (limited) at the meetings of July 31st and August 16, 1884, in respect to the stock of said company directed to be issued to Rudolph Aronson, was illegal, and that the action of the said directors, as to the extension of the contract with said Rudolph Aronson, was also illegal, and as it does not affirmatively appear that a majority of the stockholders have ratified the issue of said stock and the approval of said contract, the plaintiff is entitled to judgment, declaring such stock to have been illegally issued, and that the same is void in the hands of Rudolph Aronson, and of his assignees, and also that the extension of the contract with him is illegal and void.

Upon the trial, I understood the counsel for the defendants to contend that, as Mr. Rothschild and the others, to whom a

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part of the stock had been assigned, gave value therefor, they might stand in a better position than Aronson in respect to such stock, but as they took, subject to all the equities between Aronson and the company or its stockholders, I do not see how that contention can be maintained.

Let findings be prepared in accordance with these views, and settled on five days' notice.

UNITED STATES CIRCUIT COURT.

HARPER *et al.* agt. SHOPPELL.

Copyright—What is not an infringement.

The unauthorized reproduction and sale of a copy of a cut from a copyrighted book or weekly paper is not an infringement upon such copyright.

February, 1886.

Bangs & Stetson, for plaintiffs.

J. W. Hawes, for defendant.

WALLACE, J.—The plaintiffs sue at law for an infringement of copyright, and the case has been tried by the court, a jury having been waived. The defendant has not intentionally infringed the plaintiffs' rights, and therefore nominal damages only are claimed. The conceded facts are as follows: The plaintiffs are the proprietors of *Harper's Weekly*, a copyrighted illustrated newspaper, published weekly, and in March, 1873, they published in that newspaper an impression of a cut entitled "Getting Married, Keeping House," which formed a prominent and considerable part of the newspaper. The cut was made and designed by one Reinhart, a citizen and resident of the United States, who sold it to the plaintiffs. They have never

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parted with the original cut or given permission to the defendant or any other person to reproduce it. The defendant purchased a copy of the cut from a third person in ignorance of the plaintiffs' rights, from which an electrotype plate was made and sold by him to the proprietor of the *New York Illustrated Times*, who published an impression in the issue of that newspaper in September, 1882. It is assumed that Reinhart had not allowed this copy to be made before he sold the cut to the plaintiffs. The only question in the case is whether the unauthorized reproduction and sale of a copy of the cut by the defendant was an infringement upon the plaintiffs' copyright. The copyright of the plaintiffs' newspaper was a copyright of a book within the meaning of the copyright laws.

A copyrighted song printed upon a single sheet was held to protect as "a book," under the English statute of VIII. Anne, in *Clementi agt. Golding* (2 Camp., 25). This decision was approved and followed in two cases arising under our copyright statutes, in which it was held that a book within these statutes is not necessarily a book in the ordinary and common acceptations of the word, but may consist of a single sheet as well as of a number of sheets bound together (*Clayton agt. Stone*, 2. *Paine*, 382; *Drury agt. Ewing*, 1 Bond, 540; see also *Folsom agt. Marsh*, 2 Storey, 100). The plaintiffs might have copyrighted the cut as an independent subject of copyright. They did not choose to do so. So also they could have copyrighted each poem or song or editorial composition of their newspaper. If they had done this a reproduction of the copyrighted thing would have been piracy, however innocent the defendant might have been of intentional wrong. They preferred to copyright their newspaper and secure protection for it as an entire work. The cut was a legitimate part of the protected property as much so as the poems or editorial articles. The pictorial illustrations are one form of language employed by an author to express his ideas, and when embodied in a book are as much a component part of it as the printed text. But they did not thereby copy-

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right the cut. The statute not only makes provision for copyrighting charts, prints, cuts, engravings, &c., but makes a distinction between infringement of a book and of a cut, engraving, &c. A book is infringed by printing, publishing, importing, selling or exposing for sale any copy of the book (*sec.* 4964, *R. S.*). A chart, print, cut, engraving, &c., is infringed by engraving, etching, working, copying, printing, publishing, importing, selling or exposing for sale a copy of the chart, cut, &c. (*sec.* 4965). It would not be infringement of a book within these sections to prepare and arrange the type in exact imitation of the original, so that a copy of the book might be produced by printing, nor would it be to sell the means of making such a copy to another. The printing and publishing of a cut is an infringement of copyright as well as the printing and publishing of a book, but the copying without printing or publishing is infringement only as to the cut, chart, print, engraving, &c.

The question here is not whether the defendant has infringed the plaintiffs' copyright in a cut, but whether he has infringed their copyright in their book by making a plate from which a copy of a portion of their book could be produced, and selling the plate to another.

The copyright of a book is not always invaded by reproducing a part of the work. Where portions are extracted and published in a book or newspaper by another, the question whether there has been a piracy depends upon the extent and character of his use of them. Thus it is not piracy for a reviewer or commentator to make use of the portions of a copyrighted work for the purposes of fair exposition or reasonable criticism. The question always is whether there is a substantial identity between the original book and the reproduction, or as it is sometimes expressed, whether there has been an appropriation, substantially, of the labors of the original author. The law does not tolerate an appropriation which tends to supersede the original. A test frequently applied is whether the extracts as used are likely to injure the sale of the original work (*see Black agt. Murray*, 9 *Scotch Sess. Cases* [3d series], 356). In

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the language of the court in *Story's Ex'rs agt. Holcomb* (4 *McLean*, 308), the inquiry is what effect must the extracts have upon the original work. If they render it less valuable by superseding its use in any degree, the right of the author is infringed, and it can be of no importance to know with what intent this was done.

Applying the test here, it is not altogether clear that the proprietors of the *Illustrated Times* infringed the plaintiff's rights, although they published the cut in a competing newspaper.

In *Hutton agt. Arthur* (*Law Rep.* [8 *Exch.*, 1]), the piracy complained of was the publication of nine caricatures of Napoleon III., originally printed separately in numbers of *Punch*, issued within the period of 1849 to 1867.

The court found that the defendant had republished them "for the same purpose as they were originally published, namely, to excite the amusement of his readers," and, therefore, that piracy was made out. It was doubted, in that case, whether the publication of a single picture would have been piracy. KELLY, C. B., said: "It is said that the copying of a single picture, at all events, would not be an infringement of the plaintiff's copyright; but it is impossible to lay that down as a general rule." It is not necessary to determine the question here. Assuming that the publishing of a single poem or article or illustrations from the copyrighted newspaper may be piracy, the defendant has not done this. The reproduction of the cut and the sale of the stereotype plate without more, treating those acts as using an extract from the plaintiffs' newspaper, could not injure the plaintiffs or interfere, to any appreciable extent, with the profits they could derive from the sale of their copyrighted publication. The cut was capable of use innocently in various ways, having no relation to the publications and sale of a newspaper. If the defendant had sold the electrotype plate intending, or even expecting, the purchasers to use it in competition with the plaintiff, he might be regarded as having sanctioned that use in advance, and consequently as occupying the position of a party acting in concert with them, and responsible with

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them as joint-tort feorsors (*Wallace* agt. *Holmes*, 9 *Blatch*, 65). Thus it was held in *Dekuyper* agt. *Widdeman* (23 *Fed. Rep.*, 871) that a defendant who had printed and sold labels in imitation of a trade-mark with the purpose of enabling the parties to whom he sold them to palm off their goods upon the public as those of the owner of the trade-mark, was an infringer.

There is no evidence, however, in this case that the defendant contemplated that the purchasers would make any illegitimate use of the plates. They could have used it as he could, to print a trade-mark or an advertising cut, or in other ways which could not interfere with the sale of the plaintiffs' newspaper. The law will not assume, without evidence, or simply upon proof that the defendant sold the plate to the proprietors of a newspaper, that he intended to authorize a violation of the plaintiffs' rights (*Averill* agt. *Williams*, 1 *Denio*, 501). The defendant has copied the cut, but he has not printed or published it, nor has he exposed for sale any printed or published copy of any part of the plaintiffs' newspaper.

Judgment is, therefore, ordered for the defendant.

CITY COURT OF NEW YORK.

In the matter of IRVING, JR., &c.

Discharge of imprisoned debtor — Jail limits — Code of Civil Procedure, sections 2201, 183, 184.

An application for the discharge of an imprisoned debtor may be made in the court out of which the execution is issued.

The power of the old sheriff over prisoners ceases after ten days, and the new one has no power unless they are assigned to him.

An outgoing sheriff who neglects to deliver over a prisoner to his successor is liable to the plaintiff in the execution as for an escape.

Where, on an application to discharge a debtor who was on the jail limits, it appeared from the papers that more than ten days had expired since

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the new sheriff assumed his office, and yet it did not appear that the imprisoned debtor had been assigned to him, but on the contrary, it appeared that he was in the custody of the late sheriff:

Held, that as the late sheriff's duties, powers and functions (except those specified by law) had ceased, it cannot be said that the defendant is imprisoned, especially as he is on the jail limits, and not actually confined:

Held, further, that the court could not proceed in the matter, as to act on this petition in the absence of proof that the prisoner has been duly assigned to the new sheriff might seriously impair the rights of the execution creditor as against the late sheriff or his bondsmen.

At Chambers, March, 1886.

HALL, J.—I do not see how the court can proceed in this matter. It appears from the papers that the debtor is in the custody of Alexander V. Davidson, who up to the 1st of January last was sheriff of the city and county of New York; and a certificate is attached to the petition showing the imprisonment of the debtor, and signed by Alexander V. Davidson, sheriff, by Daniel E. Finn, deputy sheriff, dated February 17, 1886.

Section 184 of the Code of Civil Procedure requires the former sheriff, within ten days after the service of a certificate upon him by the new sheriff, to deliver all prisoners and all papers relating to their custody or imprisonment to the incoming sheriff.

It does not appear whether or not a certificate was served by the new sheriff upon the former one; but as the powers of the former sheriff do not cease until after the service of such certificate (*sec. 183, Code*), and as the new sheriff is now performing the duties of his office, I think it may be safe to assume that the certificate has been served, and the powers of the former sheriff have ceased, except as provided by law.

More than ten days have expired since the new sheriff assumed his office, and yet it does not appear that the imprisoned debtor has been assigned to him, but on the contrary it appears that he is in the custody of the late sheriff, and the late sheriff's duties, powers and functions (except those specified by law) having ceased, it cannot be said that this defendant is impris-

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oned, especially as he is on the jail limits, and not actually confined.

"The power of the old sheriff over prisoners ceases after ten days, and the new one has no power unless they are assigned to him" (*Huids agt. Doubleday*, 21 *Wend.*, 223).

"An outgoing sheriff who neglects to deliver over a prisoner to his successor is liable to the plaintiff in the execution as for an escape" (*French agt. Willett*, 10 *Abb.*, 99).

Therefore, to act upon this petition in the absence of proof that the prisoner has been duly assigned to the new sheriff might seriously impair the rights of the execution creditor as against the late sheriff or his bondsmen.

The objection to the jurisdiction of the court to entertain this proceeding in any event is not well taken; the Code (*sec.* 2201) expressly provides that it may be taken in the court out of which the execution is issued.

The proceeding must be dismissed, but without prejudice to renew upon proof that the debtor has been assigned to the new sheriff; no costs.

SUPREME COURT.

MOORE agt. RICHARDSON *et al.*

JAMES agt. SAME DEFENDANTS.

LORD agt. SAME DEFENDANTS.

Practice—Attachment—Sufficiency of affidavits.

On a motion to vacate an attachment in three cases, the main question both as to the existence of the alleged cause of action and of the fraud which is the ground of the attachment was as to the partnership of the defendants; that being alleged on information and belief based mainly on the written deposition of one of the defendants in proceedings supplemental to execution in another case. In one of the cases the affiant states that he has the deposition in his possession, but does not attach a copy or

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show any reason for not doing so. In the other cases a copy is attached showing the defendants to be partners:

Held, that the copy deposition could be considered, and without it the affidavit would be defective and not a sufficient basis for allowing the attachment.

Held, further, that in the first case the attachment cannot stand, but in the other two cases the attachment should stand.

Oneida Special Term, March, 1885.

MOTION by the defendants, in each, to vacate attachment.

Mr. Ayres, for motion.

Mr. Weston, opposed.

MERWIN, J.—The main question in these cases, both as to the existence of the alleged cause of action and of the fraud, which is the ground of the attachments, is as to the partnership of defendants. That is alleged on information and belief, based mainly on the written deposition of the defendant, Richardson, in proceedings supplemental to execution in another case. In the first of the above-entitled cases, the affiant states that he has the deposition in his possession, but does not attach a copy or show any reason for not doing so. In the other two cases a copy is attached, which, if it can be considered, gives a basis for saying that the defendants were partners.

Under the rule laid down in *Bennett agt. Edwards* (27 Hun, 882), the copy deposition can, I think, be considered. But without this the affidavit would be defective, and not a sufficient basis for allowing the attachment.

This leads to the conclusion that, in the first case (*Moore agt. Richardson*), the attachment cannot stand, and that, in the other two cases, there is enough to put the defendants to their defense, and the attachments should stand.

Motion in first case granted, with costs of motion.

Motion in the other two cases denied, with costs of motion.

Affirmed at General Term, January, 1886.

Estate of Duffy, deceased.

SURROGATE'S COURT.

In the Matter of the Estate of CHARLES DUFFY, deceased.

Accounting—Executors and administrators—What is sufficient to justify an order for an accounting by an administrator—at whose instance it may be ordered—Code of Civil Procedure, sections 2514, 2726.

The mere appearance of an interest is ordinarily sufficient to justify an order for an accounting by an administrator (1 *Bradf.* 24). The surrogate has no jurisdiction to determine the validity of a release, and where its invalidity is sworn to will direct an accounting. An accounting has been ordered at the instance of a residuary legatee who had given a release to the executor (35 *N. Y.*, 142).

New York County, March, 1886.

Charles G. Cronin, for application.

Royal S. Crane, opposed.

THIS was an application by a father and guardian on behalf of infants for the judicial settlement of the accounts of the administratrix of their maternal grandfather's estate.

The application was opposed by the administratrix on the ground that the infants were not "persons interested" in the estate under section 2514 of the Code, and therefore not entitled to an accounting under section 2726 of the Code.

To sustain her position the administratrix produced and read a release executed by the mother of the infants in her life time to the administratrix, as follows:

"NEW YORK, January 6, 1885.

"I, Mary C. Reilley, of Bridgeport, Connecticut, on this day, for the consideration of one dollar, release and sell whatever claim or title I have in the real or personal estate of my deceased father, Charles Duffy, to my mother, Letitia Duffy.

"MARY C. REILLEY."

This answer the petitioner met by an affidavit that his wife

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was induced to execute the paper purporting to be a release during her last sickness, and at a time when she was very ill, by the fraud, coercion and undue influence of the respondent, and that it was not her free act and deed.

ROLLINS, *J.*—This is a proceeding wherein the petitioner, as the guardian of the two infant children of Mary C. Reilley, deceased, applies for an order directing the administratrix of this estate to file an account. The respondent accedes that prior to January 6, 1885, Mrs. Reilley, who was one of the daughters of this decedent, was a person interested in his estate; but by the answer of the administratrix, it appears that on that day she executed and delivered to her a release of her interest therein.

The execution and delivery of this release are not disputed, but the petitioner has filed an affidavit alleging that it was obtained by the fraud, coercion and undue influence of the respondent.

The question whether the release is for this cause invalid, the surrogate has no jurisdiction to determine. But in view of the sworn allegation of its invalidity, I must order an accounting (*Fraenzmick agt. Miller*, 5 *Redf.*, 136; *Harris agt. Ely*, 25 *N. Y.*, 138; *Rieben agt. Hicks*, 4 *Bradf.*, 136; *Estate of Andress Schmidt, surrogate's decisions*, Dec. 23, 1885).

SUPREME COURT.

THE PEOPLE *ex rel.* JAMES BROWN and others agt. THE BOARD OF SUPERVISORS OF HERKIMER COUNTY.

Supervisors—Their powers and duties in relation to auditing and allowing county accounts—Mandamus—When not a proper remedy—Code of Civil Procedure, section 780—County judge cannot make an order shortening the time of service of an order returnable at special term of supreme court.

Where an account or bill is presented to a board of supervisors which is not sufficiently full in details or sufficiently verified it should be returned

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to the claimant to the end that he may make such amendments and corrections as are suitable and proper for the purpose of complying with the statutes.

Where, as in this case, the board might have required a more detailed statement of the expenditures than was given in the account as presented, yet where instead of rejecting the claim as they might have done, they proceeded to act upon it and investigate it and to a certain extent allowed it, their action will not be interfered with by mandamus.

The discretion of the board as to auditing and allowing accounts ought not to be taken away or interfered with or absolutely directed by the court.

Where a board of supervisors has acted upon a claim and passed upon its merits, the action is conclusive upon the claimant and succeeding boards. It is binding and effectual to shut off a suit for a portion of or a balance of a claim thus presented and acted upon. The allowance of an account by the board is a judicial act, and is in the nature of a judgment against the county.

If a party is not satisfied with an audit of his claim, he should review it or take such remedy as remains to him before accepting the award. By an acceptance of the audit and the order issued in accordance with it, he adopts and ratifies the proceedings had in regard thereto. They thus become mutual and operative upon the creditor and debtor.

Whether in this case a mandamus is a proper remedy if a wrong has been done, *quære*.

Under section 780 of the Code of Civil Procedure a county judge cannot make an order requiring a party to show cause why an application should not be granted which is returnable in less than eight days at a special term of the supreme court.

Oneida Special Term, December 12, 1885.

MOTION and order to show cause why a writ of mandamus should not issue to the board of supervisors of Herkimer county, commanding them to reject and disallow the bill and claim of John C. Richards for \$706, verified November 16, 1885, and also to rescind the resolution of said board passed the 9th day of December, 1885, * * * auditing and allowing said claim and bill at \$500; also forbidding said board from paying or authorizing to be paid, or issuing any order on the treasurer of Herkimer county for the payment of the same. * * *

Affidavits of relators tending to show that a similar claim was presented to the board of supervisors in 1883, and that it

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was acted upon and \$500 allowed, were read on this motion. An affidavit was read in opposition to the motion, tending to show that no claim was presented by the said John C. Richards, or by his procurement, and also tending to show that he did not receive the \$500 allowed that year *in full of his claim*. Also an affidavit was read of Mr. O. H. Springer, chairman of the board, to the effect that the present claim was fully investigated and allowed.

The order to show cause was granted by the county judge of Herkimer county December 11, and returnable at this term December 12.

George W. Smith, for relators.

Amos H. Prescott, for the board of supervisors, opposed.

HARDIN, J.—Upon the argument of the motion the sufficiency of the account and the details of its items were challenged. By an inspection of the account, it appears that charges are made for money expended in 1879, 1880, 1881 and 1882. There are four items named in the bill as presented, and they amount to \$706. Attached to the account is the usual formal affidavit required by chapter 495 of the Laws of 1847. The details of the expenses are not stated as fully as the board, under that act, might have required, but the act has had some judicial examination in *People agt. The Supervisors of St. Lawrence Co.* (30 How. Pr., 173). It seems to be the doctrine of that case that where the claim is not sufficiently full in details, or sufficiently verified, it should be returned to the claimant, to the end that he may make such amendments and corrections as are suitable and proper for the purpose of complying with the statute.

Doubtless, in the case now in hand, the board might have required a more detailed statement of the expenditures than was given in the account as presented. If the claimant had not rendered such a detailed statement, the board might have, for that reason, rejected the claim, but, instead, the supervisors

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proceeded to act upon it and to investigate it as is stated in the affidavit of the chairman of the board. The board had power to examine witnesses, and gather such proofs as they desired in regard to the claim before taking final action thereon (1 *R. & [1st ed.]*, 853, *sec.* 38; *People agt. Supervisors of Fulton Co.*, 14 *Barb.*, 52).

The practice of receiving so general a statement or a bill in gross, like the one now before the court, cannot be commended. A more cautious and faithful regard for the desire of taxpayers, to learn what items have been allowed on the part of the board of supervisors, would have led them to exact of the claimant a further and more minute and extended bill of particulars. But ought it now to be held that the account was so meagre that, to receive and consider it in the form in which it was presented, was unauthorized and illegal?

The case to which reference has been made, seems to require a negative answer to the question. It cannot be said that the board had not jurisdiction of the claim, because it was too general and indefinite. Assuming that the board has power to require a claim to be more elaborately itemized than the one presented, of course, to what extent the power should be exercised rests somewhat in its discretion. Ought such discretion to be controlled by the court? It has been adjudged in numerous cases, that the discretion of the board ought not to be taken away or interfered with or absolutely directed. Where they have a discretion in regard to amounts to be allowed, and have acted properly, the courts have refused to interfere by a mandamus (*People agt. Supervisors of Albany Co.*, 12 *John.*, 414; *Hall agt. Supervisors of Oneida Co.*, 19 *id.*, 259). The same principle is laid down in *The People agt. Supervisors of New York* (1 *Hill*, 67). In that case, after stating the rule, judge BRONSON adds, viz.: "If the supervisors have gone too far in disallowing one-third of the amount claimed, the relator has no remedy in this form (mandamus) if he has in any other. So, here, the relators cannot prevail, because the account was so general and indefinite upon which the board assumed to act.

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First. It is insisted that the action of the board of supervisors in 1883, in allowing \$500 upon a claim then presented, and by the acceptance of an order for \$500 by the claimant, issued in pursuance of the action of the board upon such claim, stand in the way of the present claim.

Second. It is undoubtedly true that where a board of supervisors has acted upon a claim and passed upon its merits the action is conclusive upon the claimant and succeeding boards. It is binding and effectual to shut off a suit for a portion of or a balance of a claim thus presented and acted upon (*People agt. Supervisors of New York*, 1 *Hill*, 337; *Martin agt. The Board of Supervisors of Greene*, 29 *N. Y.*, 645; *Bank agt. Board of Supervisors of Otsego*, 51 *id.*, 401; *Board Supervisors agt. Ellis*, 59 *id.*, 620; *West Winfield Bank agt. Supervisors of Herkimer Co.*, 56 *Barb.*, 452; *Osterhoudt, tax-payer, agt. Rigney*, 98 *N. Y.*, 322).

In *People agt. Supervisors* (33 *Hun*, 306), the court, in speaking of the allowance of an account by the board, says: "This act was a judicial act, and adjudicated the amount the relator was entitled to receive (10 *N. Y.*, 260). Their audit was in the nature of a judgment against the county."

However, it is insisted that the claimant did not present a claim in 1883, to the board for allowance, and therefore he is not bound by the action of the board. The obvious answer to that position is that he subsequently accepted the result and ratified the action of the board or supervisors and adopted the claim thus presented by receiving the order issued in satisfaction of such audit. By such an acceptance the proceedings leading up to the order, so far as they became known to the claimant were sanctioned and adopted. So far as the claim which was investigated and audited by the board of 1883, the acceptance of the amount audited and allowed by that board must be held an adoption of the judgment or audit preceding the issuance of the order. The concluding language of PRATT, J., in *People agt. Supervisors* (33 *Hun*, 307), is applicable. He says: "By accepting the amount of the audit the relator (claimant) waived

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his right to further prosecute his claim." It is a salutary rule of law that parties shall not be allowed to split up a claim and maintain several suits or proceedings upon its fractional parts in the courts. The reason for the rule is applicable to claims presented to boards of supervisors. If a party is not satisfied with an audit of his claim he should review it or take such remedy as remains to him before accepting the award. By an acceptance of the audit and the order issued in accordance with it he adopts and ratifies the proceedings had in regard thereto. They thus become mutual and operative upon the creditor and debtor (29 *N. Y.*, 645; 45 *id.*, 209; *Knapp agt. Brown*).

It is the reception of the order by the claimant that gives his final right to the money. Before the order has been issued the supervisors may reconsider, review and recall their previous action. Their action is judicial but they retain control of the proceedings until they are consummated (*People agt. Stocking*, 50 *Barb.*, 573).

They are not liable in a civil action, however erroneous their action may be, because they are acting judicially in settling and allowing accounts chargeable to their county (*People agt. Stocking*, *supra*; *Chase agt. Saratoga Supervisors*, 33 *Barb.*, 603).

If the account and claim presented and allowed and audited in 1883, were clearly identical with the account and claim presented in 1885, then it would not be difficult to determine that the board had no right or power to readjust it, or to allow any part of the claim involved in the audit of 1883, and that it was erroneous to award the claimant anything upon his account presented in 1885 (*Osterhout, tax-payer, agt. Rigney, supra*).

But from the proofs before the court such conclusion is not easily reached. The items of the account differ. The phraseology in regard to disbursements differs. Besides there is some force to be given to the affidavit of the chairman of the board. Mr. Springer says in that affidavit that "he is well acquainted with the facts relating to the said claim or demand * * * and that he believes that the same has been justly and fairly investigated by the said board."

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As before stated, the board had power to examine papers and witnesses. If the investigation was made as fully as the board had power to make it, it may have developed the fact that the account of 1885 does not include the items, or any of them, in the account of 1888. Surely, upon conflicting affidavits, and without the benefit of the details and developments of the investigation spoken of, a conclusion ought not to be reached which would control the final action of the court in the premises. Clearly a peremptory mandamus ought not to issue upon the papers now before the court. In the argument addressed to the court, the question of whether a mandamus is a proper remedy, if a wrong has been done, has not been discussed by the learned counsel. The question is not free from doubt. Usually the writ of mandamus is used to compel action; not to require a decision in a "particular way." If boards of supervisors could be required to decide matters of discretion and judgment, and matters of a judicial nature, their action would no longer be their judgment or discretion, but that of the court awarding the writ (*Howland agt. Eldridge*, 43 N. Y., 461).

In *People agt. Common Council* (78 N. Y., 39), RAPALLO, J., in speaking for the court of appeals, says, "a subordinate body can be directed to act, but not how in a matter in which it has the right to exercise its judgment. * * * Where a subordinate body is vested with power to determine a question of fact the duty is judicial, and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be."

In the case in hand, if the board have determined the fact correctly upon which their right to audit the claim in question rests, then its conclusion is just and legal.

From the foregoing views it appears that a peremptory mandamus ought not to issue upon the papers now before the court.

It is not necessary to determine in this case whether an alternative writ should issue, as there was a preliminary objection

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taken to the order to show cause which must be sustained. The order prescribed less than eight days' notice and was granted by a county judge (*Rule 37; sec. 780, Code Civ. Proc.; Larkin agt. Steele, 25 Hun, 254*).

The motion for a mandamus is denied, without costs to either party. An order to that effect may be entered in Herkimer county.

COURT OF APPEALS

THE MERCHANTS' NATIONAL BANK OF THE STATE OF NEW YORK, respondent, agt. SHEEHAN, appellant.

Code of Civil Procedure, section 870—Depositions before trial—Order may be granted before suit brought, upon the application of either plaintiff or defendant, for the examination of his adversary.

Section 870 of the Code of Civil Procedure, authorizes an order for the examination of a person against whom an action is about to be brought, upon the application of the person who is about to bring such action, but before it has been actually commenced.

Decided January, 1886.

M. J. Scanlan, for appellant.

G. Zabriskie, for respondent.

ANDREWS, J.—The question on this appeal depends upon the construction of section 870 of the Code, which is as follows: "The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court, &c., may be taken at his own instance, or at the instance of an adverse party, or of a co-plaintiff or co-defendant, at any time before the trial, as prescribed in this section."

The question presented is, whether this section authorizes an order for the examination of a person against whom an ap-

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plication of the person who is about to bring such action, but before it has been actually commenced.

The section is obscure, and its interpretation is by no means clear. The deposition to be taken is of the person "who expects to be a party." A person who contemplates bringing an action expects to be a party thereto, and it seems to be clear that under the section he can procure his own testimony to be perpetuated. The person against whom the action is to be brought may expect to be sued. A suit may have been threatened, or he may know that a cause of action has accrued against him, or that a liability is claimed likely to result in litigation. Is the remedy given by this section available to either of the persons so situated, and may an order be granted before suit brought, upon the application of either, for the examination of his adversary?

Considering this section alone, the most natural meaning would seem to be that a person who expects to become, or to be made a party to an action, may, on his own application, have his deposition taken in anticipation of the actual commencement of the suit, and that the words "or at the instance of an adverse party," only apply when the person seeking the examination of his adversary is a party to a pending action. The change of phraseology by the substitution of the word party in the second clause for the word person in the first clause gives some force to this construction. But section 876 seems to render it clear that a proceeding under section 870 may be instituted by an adverse party against the other, although no suit has been commenced, but is only contemplated. That section provides that certain specified sections for the punishment of contumacious witnesses shall apply "to the examination of a party or a person expected to be an adverse party." It would be absurd to provide for the punishment of a person who sought to perpetuate his own testimony. The section plainly was intended to provide for the case of a contumacious witness.

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expected to be made a party to an action, whose examination was sought by his adversary.

On the whole, we are of opinion that the order issued in this case on the application of the bank for the examination of Sheehan, against whom the bank was about to commence an action, was authorized, and that he was in contempt for disobeying it. The bank might have commenced its action, and then have procured an order for the examination of the defendant. The granting of an order in such a case as this, before suit brought, upon the application of the proposed plaintiff, is within the discretion of the court, but it can rarely happen that justice will be promoted by granting an order on the application of a proposed plaintiff, before the commencement of an action, and the practice, unless carefully guarded, may lead to great abuses.

The order should be affirmed.

All concur.

SUPREME COURT.

THOMAS LACY agt. SOPRONIA A. GETMAN, as executrix, &c., of
JOHN H. McMAHAN.

Contract for the rendition of personal services—Effect upon the contract of the death of the employer—When executor of employer not bound to fulfil.

The plaintiff was hired by the defendant's testator to do ordinary farm work for one year at \$200 per year. Near the middle of the year the employer died. The plaintiff continued to work on the farm, as provided in the contract, until the end of the year. In an action against the executrix to recover the \$200 due under the contract:

Held, that the death of the testator terminated the contract, and the recovery should be limited to the value of the services up to the death of the testator.

Jefferson Circuit, December, 1883.

MERWIN, J.—In the spring of 1882, defendant's testator employed the plaintiff to work for him upon his farm for one

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year, from March 1, 1882, at the agreed price of \$200. Plaintiff entered upon the employment, and in July, 1882, the defendant's testator died. The plaintiff continued at work upon the farm until March 1, 1883, but the defendant was not in possession. The question is, did the death of defendant's testator terminate the contract?

In *Chitty on Contracts* (vol. 2 [11th Am. ed.], 841, 842) it is laid down that in all cases of contracts between master and servant, the death of either party dissolves the contract, unless there be a stipulation, express or implied, to the contrary.

The case of *Farrar agt. Wilson* (*L. R.*, 4 C., 744) is cited to the proposition. There the plaintiff was employed as a farm baliff at weekly wages, the services to be determinable by six months' notice or payment of six months' wages. The employer died and plaintiff brought suit for six months' wages against the administrators, they having dismissed the plaintiff. It was held the plaintiff could not recover, the court saying that where personal considerations are of the foundation of the contract, as in cases of principal and agent, and master and servant, the death of either party puts an end to the relation; and in respect of services after the death, the contract is dissolved unless there be a stipulation express or implied to the contrary; that if the servant had died, the master could not have compelled further performance, and the same rule would relieve the representatives of the master in case of his death, the ground being that of implied conditions.

By the death of the master the servant is discharged (2 *Williams on Exrs.* [8th Am. ed.], 890). In 2 *Addison on Contracts* (sec. 901), it is stated generally that a contract of hiring and service is dissolved by the death of the master or servant, and the same is laid down in *Woods, Master and Servant* (sec. 158). In *Dexter agt. Norton* (47 N. Y., 65), it is said by CHURCH, C. J., that in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party in accordance with the condition of continued existence raised by implications.

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In *Clark agt. Gilbert* (26 N. Y., 279), and *Fahy agt. North* (19 Barb., 341), recoveries for services were sustained in favor of the employed by their representatives, on the theory that death of the employed ended the contract. The latter case was for services in farm work. In the ordinary case of master and servant I do not see why the death of the employer should not work the same results as the death of the employed. The personal character of the relation applies to both. If the servant cannot be compelled to continue after the death of the master, then the master's representatives should not be compelled to have him. The contract, if existing at all, should be mutual. If the servant had continued on at the request of the executor or administrator, or the executor or administrator had received the benefit of such services, another question would have arisen; but that is not the case. The defendant is not in possession of the farm and is not shown to have received any benefit of the subsequent services of the plaintiff.

I have examined the cases cited by the counsel for plaintiff, and they do not in my judgment reach the question here. I am of the opinion that the death of defendant's testator terminated the contract, and that the recovery of plaintiff should be limited to the value of the services to the death, being \$76.45, and interest from 6th of April, 1883. This amount was conceded at the trial, and the verdict should be reduced to that in pursuance of the arrangement at the trial. An order in proper form may be prepared by the defendant's counsel and submitted to the other side with the opinion and then forwarded to me. I do not understand that the question of costs is now before me.

NOTE.— We publish the above at the request of Elon R. Brown, Esq., attorney for defendant, and deem it proper to give a short history of the case. The jury in this case rendered a verdict for \$208, which was reduced by the trial judge in accordance with foregoing opinion to \$30.60. On appeal by plaintiff the judgment was reversed and a new trial granted, principally on the ground that the court erred in rejecting the offer of plaintiff to show that he performed the contract after the death of the testator, under the direction of the defendant. Opinion by BOARDMAN, J. (85 Hun, 46), FOLLETT, J., in concurring cites *Babcock agt. Goodrich*, which

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at his request we published a short time since (*ante*, p. 52), it not having been previously reported. On the second trial, at the Jefferson circuit, CHURCHILL, J. presiding, ruled at the close of the trial that the death of the testator, the master, did not dissolve the contract, and judgment was entered by direction of the court for \$262.83 damages and costs. Defendant again appealed to the general term, which has just reversed the judgment opinion by KENNEDY, J. We regret not having the opinion before us. As is said in judge MERWIN's opinion above, we "can see no good reason why in the ordinary case of master and servant, the death of the employer should not work the same results as the death of the employed. The personal character of the relation applies to both. If the servant cannot be compelled to continue after the death of the master, then the master's representatives should not be compelled to have him. The contract, if existing at all, should be mutual."—[Ed.]

SUPREME COURT.

PFANDLER BAUN BUNGING APPARATUS COMPANY, respondent,
agt. CASPER PFANDLER *et al.*, appellants.

Costs—When travel fees paid witness should be allowed—When stenographer's fees for copy of the evidence will not be allowed—Code of Civil Procedure, section 84.

Where, at the time of the trial, the witness' permanent residence was in the city of Rochester, but, when subpoenaed, he was temporarily in the city of New York on business, and refused to attend unless he was paid the statutory travel fees, and the plaintiff paid him, he making an affidavit that he was obliged to travel from the city of New York to the city of Rochester for the purpose of attending the trial, and, after it was over, to return to New York:

Held, that the travel fees were properly allowed, and the plaintiff had a right to tax them.

The rule is to allow travel fees when paid to a witness in such cases, unless it appears that the party was in fault and guilty of negligence in omitting to serve the subpoena before the witness left his home, and, in view of the facts as disclosed, it was incumbent on the party resisting the allowance to show the fault of the party paying the travel fee.

Where the plaintiff procured from the reporter a copy of the evidence, whose fees were allowed as an item of disbursement in the bill of costs as taxed, and the affidavit as to the disbursements, which was made by the

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plaintiff's attorney, states that the items of disbursements set forth in the bill were "actually made and incurred," the trial judge made a certificate that, on the trial, he directed the stenographer's minutes to be furnished the court, and that the reporter's fees be taxed as a disbursement:

Held, that as it did not appear that the court used the copy procured by the plaintiff, or that it was obtained by him for that purpose, the item should have been disallowed.

Fifth Department, General Term, October, 1885.

AN appeal from an order of the Monroe special term, denying the defendants' motion for a retaxation of the plaintiff's costs.

The action was tried at the Monroe special term.

J. and Q. Van Voorhies, for appellants.

Theodore Bacon, for respondents.

BARKER, *J.*—The travel fees paid the witness Hawley were properly allowed. At the time of the trial the witness' permanent residence was in the city of Rochester. When subpoenaed he was temporarily in the city of New York on business. He refused to attend unless he was paid the statutory travel fees. The plaintiff thereupon complied with this demand and paid him \$33.30. Hawley made an affidavit that he was obliged to travel from the city of New York to the city of Rochester for the purpose of attending the trial, and after it was over to return to New York.

Upon these facts and circumstances the parties submit the question as to the right of the plaintiff to tax the fees of the witness. We cannot say that the plaintiff was in fault in omitting to serve a subpoena on the witness at his permanent home before he left on business for the place where he was found and served. As it appears that the witness was compelled to make the journey in obedience to the demands of the process, it was just and proper for the plaintiff to indemnify him for his traveling expenses. The rule is to allow travel fees when paid to a witness in such cases, unless it appears that the

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party was in fault, and guilty of negligence in omitting to serve the subpoena before the witness left his home.

In view of the facts as disclosed, it was incumbent on the party resisting the allowance to show the fault of the party paying the travel fee (3 *Wail's Pr.*, 303; *Abb. N. Y. Dig.*, vol. 2, p. 413). The plaintiff procured from the reporter a copy of the evidence, whose fees amounted to \$40.05, which was allowed as an item of disbursement in the bill of costs as taxed. The affidavit as to the disbursements was made by the plaintiff's attorney, and it states that the items of disbursement set forth in the bill were "actually made and incurred." The trial judge made a certificate in which he stated that, on the trial, he directed the stenographer's minutes to be furnished the court, and that the reporter's fees be taxed as a disbursement.

The defendant presented an affidavit that, at the close of the trial, he called for and procured a copy of the reporter's notes for which he paid. It does not appear that the court used the copy procured by the plaintiff, or that it was obtained by him for that purpose. For this reason that item should have been disallowed. The judge's direction to the stenographer for a copy of the minutes of the trial, did not direct that the fees be paid by either party, and it is, therefore, to be presumed, if a copy was, in fact, made for the use of the court, it was without any charge to be paid therefor (*Code of Civ. Pro.*, sec. 84).

The order is modified by directing the costs to be readjusted, striking out the item of \$40.05 stenographer's fees, and striking out the allowance of costs to the respondents on the motion at special term.

No costs of this appeal to either party.

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COURT OF APPEALS.

BUTLER agt. SMALLEY and another.

Manufacturing corporations—Laws 1848, chapter 40, section 12—Filing of report—Personal liability of trustees—Reasonable time—Order for filing nunc pro tunc.

- The limitation of "twenty days," contained in section 12 of chapter 40 of the Laws of 1848, applies only to the act of making the annual report, and not to the filing and publishing of such report; but the filing and publishing should be done within a reasonable time after the twenty days.
- Where the report was made and delivered to the secretary, who published it the next day, the 18th of January, but by his mistake it was not filed until the 18th day of February, it is not such a default as will make the trustees personally liable.
- As to what would be reasonable time depends upon the circumstances of the case.
- Where the order has not been filed within the twenty days, the procuring of an order directing its filing *nunc pro tunc* would not relieve the trustees of liability, if the statute actually required that the filing be within twenty days.

Decided January 1886.

Mr. Winsor, for appellant.

Mr. Irish, for respondent.

DANFORTH, J.—The Lathrop Anti-frictionate Company was organized under the manufacturing law of 1848 (*chap. 40*). It made and published a report of its affairs, as required by section 12 of that act, within twenty days after the 1st day of January, 1878, but the report was not filed until February 13th. The defendants were its trustees, and the plaintiff, claiming to be a creditor of the company, brought this action to fix a liability upon them for his debt, on the grounds (1) that the report was false in fact, and (2) was not filed within the same twenty days, "nor as soon as practicable thereafter." The first ground seems

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now to be abandoned by the counsel for the respondent, and, indeed, could not well be insisted upon. There is no finding that the report was false, nor that the defendants signed it knowing it to be false, but only that it omitted from the aggregate of indebtedness certain liabilities of the company, and that this was known to the defendants at the time the report was made and filed; nor is there any finding either of bad faith or of willful or fraudulent purpose on the part of the trustees, nor of any fact showing actual fraud; and, without one or the other of these things, the penalty imposed for signing a report "false in any material representation" (*sec. 15 of the act of 1848, supra*) is not incurred (*Pier agt. Hammore*, 86 N. Y., 95; *Bonnell agt. Griswold*, 89 *id.*, 122).

The other point is disposed of by the construction given to section 12 (*supra*), in *Cameron agt. Seaman* (69 N. Y., 396). In that case the precise question was whether the report must be filed and published as well as made within the twenty days from the first of January, in order to meet the exigency of this section; and it was held that the limitation of twenty days applied only to the act of making, and did not apply to the acts of filing and publishing; that, as to those acts, the section was directory; but as the object of the act was to insure a speedy and public disclosure of the contents of the report, it was said that the law, in the absence of an express provision on the subject, implies that both filing and publication should be within a reasonable time after the twenty days, and that this requirement exacted prompt performance and diligent action on the part of the trustees. This rule was laid down as most consistent with reason and a due regard to convenience and justice, and leads to an inquiry in any given case whether the party on whom the duty is imposed is shown to be in default. In that case, the report was made within the twenty days, sent by mail to the county clerk and to the newspaper on the twenty-first day, and was in fact both filed and published, but of course not until after the expiration of the twenty days.

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Now, in the case before us, it is conceded that the report was made within the twenty days, viz., on the 17th of January. It was conclusively proven that, at the moment of making, the report was delivered to the secretary for filing and publication. He caused its publication the next day; and the plaintiff himself proved that it was owing to the mistake of the secretary that it was not then filed. At the outset of the case the plaintiff introduced and put in evidence the annual report of the company, dated January 17, 1878, and a petition dated February 8th, addressed to the supreme court, and its order therein. The report was in form sufficient, and the petition, verified by the secretary, stated that the report was published on the 18th of January, but, "by mistake, was not filed in the office of the clerk of the county of New York." The prayer of the petition was granted, and the court, on the 13th day of February, ordered the report filed as of January 17th. In the course of the trial the defendant, John Smalley, had testified that the report was filed in the clerk's office January, 1878, and, upon cross-examination, the plaintiff's counsel called his attention to that evidence, saying: "And that you still affirm? is that so? *Answer.* That is so, in one respect." And being further pressed, said: "That report was made out and given to my son [meaning the secretary], and I supposed he took it there." This answer was, on motion of the examining counsel, stricken out; but subsequently, on the same examination, the question was repeated, the plaintiff's counsel saying:

"Question. I now repeat my former question, did you swear on your direct examination as follows: 'Q. Do you know whether there was any report of the Lathrop Anti-frictionate Company filed in 1878, in January of that year? A. Yes, sir; there was?' *Answer.* I did. Q. You did not file it yourself? A. No, sir. Q. Don't you know that your son, William W. Smalley, subsequently, and as late as February 8th, made an application to the court upon a petition, in which he swore that through some mistake or other that report had not been filed within the first twenty days of the year, as required by law?

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A. I think I did. Q. Why did you swear as you did, that the report was filed in January, when you knew that your son had made a petition, under oath, that it was not? A. As far as I was concerned, it was filed; I did everything in my power; I had helped him to make out a report, and he took it, and I was not aware at the time but what it was filed."

William Smalley, referred to by the foregoing witness, testified that he was secretary of the company; that the report was filed in 1878, and published. He testified to the preparation of a petition to the supreme court for leave to file the report, and the granting of the order, on the 13th of February, that the report be then filed *nunc pro tunc*, as of the 18th of January, 1878.

The referee committed no error in refusing to hold that the order relieved the defendant. Such entries are sometimes made in the progress of litigation, upon the principle that a delay of the court shall prejudice no one. Here the duty to file the report was imposed by statute upon the corporation, and over it the court had no jurisdiction. But the application was an act by the defendant in furtherance of his duty, and an indication of good faith in respect to the proper disposition of the report. It was an effort to do that which the corporation had not done.

Under another act, similar in its purpose (*Laws 1875, chap. 611, sec. 18*), a director may escape the consequences of an omission on the part of the company by himself, subsequently and within a fixed time, filing a certificate or report; but no such provision is to be found in the act before us. It is enough, however, as we have seen (*Cameron agt. Seaman, supra*), that it be filed within a reasonable time after the expiration of the twenty days; and the referee was asked to find that whether this was done would depend upon the circumstances of the case. This he refused to do, and the defendant excepted. In this the referee erred, and also in finding that there was neither prompt performance nor diligent action on the part of the company with respect to the filing of the report. To prepare a report for filing and publication, to place it in good faith in the hands of the secretary for

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deposit in the clerk's office, and in the office of a newspaper, is, at least, equal in significance to a delivery of a report to a mail agent for transmission to those places. In the one case, as in the other, the company avails itself of the usual method of performing its duty; and in the absence of anything to show the want of good faith and active diligence in respect thereto on its part, a trustee, when no time is fixed by statute within which an act shall be performed, should not be subjected to a penalty, provided the thing required is actually done at a reasonable time, having regard to the nature and circumstances of the performance. The case at bar is not within the mischief at which the act is aimed, as it concededly is not within its terms. The referee erred in refusing to find as requested, and he found without evidence the existence of a default upon which the defendant might be charged.

We think the judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

All concur, except RUGER, C. J., and RAPALLO, J., not voting.

SUPREME COURT.

BABCOCK agt. BALSTON.

Examination of a party before trial — Who may make the order — Code of Civil Procedure, sections 872, 873, 8202.

The recorder of the city of Watertown has power, and may make an order, for the examination of a defendant under sections 872 and 873 of the Code of Civil Procedure.

Jefferson Special Term, March, 1885.

MOTION by defendant to vacate an order for the examination of the defendant, under sections 872 and 873 of Code of Civil Procedure, made by the recorder of the city of Watertown.

Babcock agt. Balston.

Mr. Smith, for motion.

Mr. Rogers, opposed.

MERWIN, J.—The question is, has the recorder of the city of Watertown power to grant the order? By section 19 of title 4 of the charter of that city (*chap. 714 of 1869*), it is provided that the recorder, "in case he shall be of the degree of counselor at law in the supreme court, shall possess all the powers and may perform all the duties that are now performed by a judge of the supreme court at chambers."

A justice of the supreme court, at chambers, could have granted the order in question, and therefore it is argued the recorder could do it.

The section (872) under which it was granted gave the power to grant it "to a judge of the court in which the action is pending, or to a county judge." It is claimed by the defendants that the use in the Code of the former expression limited the power, there given, to an officer who was in fact a judge of the court.

By section 780 of the Code, the time of serving a notice of motion must be eight days, unless "the court or a judge thereof," by an order to show cause, shorten it. In *Larkin agt. Steele* (25 Hun, 254) it was held that a county judge could not, under this section, make the order to show cause, the ground apparently taken being that the practice did not exist before the Code, that the provision was special in its character and not affected by the general provisions of sections 241 and 772.

In *Kinney agt. Roberts* (26 Hun, 166) the same court held that a special county judge who, under chapter 108 of 1851, possessed the powers of a county judge out of court, could grant an order for examination under section 872, thus in substance holding that a grant of a power to "a county judge" could be exercised by another officer who had the powers of a county judge out of court.

In *Babcock agt. Clark* (23 Hun, 391) it was held that the

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power given by section 606 to "any county judge" to grant injunctions could be exercised by a special county judge.

In *Seymour agt. Mercer* (13 *How.*, 564) a special surrogate, who had the powers of a county judge out of court, was held authorized to grant an order of arrest under old Code, section 180, which gave such authority to "a county judge." Under the old practice, it was held that a commissioner, who was authorized to perform the duties of a judge of the supreme court at chambers, was authorized to make an order that could be made "by the court or any judge thereof in vacation" (9 *Wend.*, 482; 10 *id.*, 568; *Graham's Pr.* [2d ed.], 26). The present Code does not undertake to limit the powers of recorders, but, so far as it treats of that officer, it expresses a design not to interfere with any of his collateral duties (sec. 8202). It does not undertake to define the powers of one who has the power of a justice of the supreme court at chambers.

The form in which the power is given in section 872 does not in substance differ from that used in many other sections.

The act of 1869 has never been repealed, the power has been acted on for many years, and this in a doubtful case should have a bearing.

It seems to me that it should be held that the recorder had power to make the order. The logic of the cases (in 26 *Hum* and 18 *How.*) uphold, I think, that construction.

That is the result if both statutes are read together and force given to each. The manner of the designation in the Code or its variance from that in the Revised Statutes (3 *R. S.* [6th ed.], 662), is not such as to abrogate the force of the statute of 1869. The designation referred to in the Revised Statutes had more particular reference to the office of supreme court commissioner, which was abolished in 1846.

A constitutional objection raised by the defendant's counsel is, I think, disposed of by the case of *Hayner agt. James* (17 *N. Y.*, 316).

If upon the examination improper questions are asked, the

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party can then claim his privilege (*Sprague agt. Butterwith*, 22 Hun, 502).

The foregoing considerations lead to the denial of the motion, with costs of motion.

NEW YORK SUPERIOR COURT.

A. BELMONT PURDY *et al.* vs. HORACE WEBSTER and another.

Code of Civil Procedure, section 895 — When open commission to take testimony may issue.

An open commission cannot be allowed where the testimony is to be taken elsewhere than in the United States or in Canada.

On an application for an open commission, where the witnesses that the defendants proposed to examine did not reside in Florida, nor did it appear that they were at the time of such application in that State, but it did appear that they resided in the island of Cuba;

Held, that such an order should not be granted unless it was made to appear that such a commission was absolutely necessary for the protection of the applicant's rights.

Special Term, March, 1886.

James B. McKerran, for the motion.

J. Hampden Dougherty, opposed.

INGRAHAM, *J.*—By section 895 of the Code an open commission cannot be allowed where the testimony is to be taken elsewhere than in the United States or in Canada.

The witnesses that the defendants propose to examine do not reside in Florida, nor does it appear that they are at present in that State; but it does appear that they reside in the island of Cuba.

This application, therefore, for an open commission appears to be intended to evade the prohibition contained in section 895, and I do not think such an order should be granted unless it

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is made to appear that such a commission was absolutely necessary for the protection of the applicant's rights.

No reason is given here to show that it would be any more difficult for defendants to procure the attendance of the witnesses sought to be examined at New York than in Florida, except the difference in the expense, and as the evidence is for the benefit of the defendant it is not fair that the plaintiffs should be put to the expense of employing counsel in Florida or sending a representative there to attend such an examination.

Under all the circumstances I think that the application for an open commission should be denied. Defendants, however, may take an order for a commission in the usual form to examine the witnesses named, either in Florida or in Cuba if they desire. Order can be settled on notice.

COURT OF APPEALS.

THE PEOPLE agt. PATRICK KIERNAN.

*Criminal law—Code of Civil Procedure, sections 1085, 1051, 1058, 1059—
Jury—Practice as to drawing—When challenge to the array will not be
sustained—Murder—Evidence of premeditation.*

A challenge to the array, on the ground that the names of additional jurors were not properly drawn, will not be sustained, if the jurors were drawn "in open court," and "from the box directed by the court," even though no directions were given by the court, except by the formal order entered, where that specified the box as the one "containing the names of the trial jurors for said court." The fact that the other two boxes were not in court is a mere formal irregularity.

Where the prisoner the night before fired one barrel of his revolver in his saloon, leaving three barrels loaded, and just before committing the crime said: "You or me going to die;" it is sufficient to justify the jury in finding that the murder was deliberate and premeditated; and whether the previous firing was intended to empty the revolver or to test it is a question of fact for the jury.

Decided January, 1886.

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Benjamin Downing, for appellant.

John Fleming, for the people.

FINCH, J.—The prisoner's challenge to the array was made in writing; issue taken by the district attorney upon its alleged facts; that issue tried by the court; and the challenge overruled. It averred, as the error in drawing the panel of additional jurors ordered by the court, "that the names of such jurors were not drawn from the box or boxes by the court directed, publicly, in open court, in the presence of the court, as by law provided." The broadest possible construction of this language would result in an averment of but two facts; one, that the names of additional jurors were not drawn from the box directed by the court; and the other, that they were not drawn in open court. The mode of drawing is prescribed in detail by the Code of Civil Procedure (*sec. 1035, et seq.*). There are three boxes provided for the ballots, in which are the names of the jurors selected to serve for three years. Box No. 1, at the beginning of the three-years term, contains the names of all the jurors liable to be drawn; No. 2, as terms are held, contains the names of jurors who have been drawn and served; and box No. 3 contains duplicate ballots of the trial jurors selected who reside in the city or town where a trial term is appointed to be held—so that box No. 1 is the ordinary source of supply, and box No. 3 is provided for an emergency, when there is no time to call jurors from a distance. As the terms proceed, the names of jurors who have served are placed in box No. 2, so that the contents of boxes 1 and 2 are continually changing. If, during the three years, the ballots in No. 1 become exhausted, the drawing goes on from box No. 2 until the new lists are transmitted (*sec. 1051*). When additional jurors are found necessary at a term of the court, an order is made "requiring the clerk of the county to draw, and the sheriff to notify, any number of trial jurors specified, in the order which

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the court deems necessary" (sec. 1058). In the present case that order was made and entered, containing all the prescribed requisites. By the next section (sec. 1059) the mode of obeying the order is fixed. "The clerk must thereupon forthwith bring into court all the boxes wherein ballots containing the names of trial jurors are deposited, as prescribed in this article; and must, in the presence of the court, publicly draw from such box or boxes as the court directs the number of trial jurors specified in the order." It is now said that all the boxes were not brought into court. No such omission was alleged in the prisoner's challenge. That specified no irregularity from the absence of requisite boxes, and no evidence upon the subject was needed or produced. There was no such issue, and no proof to maintain it. If the statements of the clerk that "only one box was brought into court, and that there is only the one box to bring in and draw from," establish that the other two were not already in court, and were not brought in, the irregularity would be purely formal, and work no possible harm to the prisoner, if the court selected the box. The clerk testified that the 150 additional jurors required by the order were drawn by him "in open court," and "from the box directed by the court." The irregularities alleged in the challenge were thus directly disproved, and justified the court in overruling it. It is contended, however, that the court did not direct from which box the names should be drawn. The clerk swears that such direction was given, and he obeyed it. If none was given, except by the formal order entered, that was sufficient. It identified the box to be brought in and drawn from as the one "containing the names of trial jurors for said court." This language must be construed to mean the box of ordinary supply, and containing the names of all the trial jurors liable primarily to serve at that term of the court, and that could only have been box No. 1. It could, perhaps, be said that the order might have referred to either of the others, and so was ambiguous. But, conceding so much, the court must have understood its own order, and the drawing, having occurred in its presence,

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and with its assent, must have been from the box intended and directed. We do not think that any irregularity was established.

The further argument of this appeal rested upon the facts; and the contention was urgently pressed that there was no evidence of premeditation or deliberation which warranted a verdict of murder in the first degree, and that the court erred in refusing to take that question from the jury. We have read the evidence carefully, and given it the reflection and study which the importance of the case demands, and feel constrained to say that there is evidence of deliberation and premeditation upon which it was the province of the jury to pass. The prisoner testified, in his own behalf, admitting that he shot McCormick, but claiming that it was unintentional, and in the heat of a struggle, in which the deceased was the assailant, and the Italian witness Asproth apparently coming to his assistance. In very many particulars this version of the affray was contradicted, and the jury were led to disbelieve the prisoner's evidence. There was testimony that on Saturday evening, the night before the killing, McCormick, who was the prisoner's landlord, was at defendant's saloon, and threatened to dispossess him. Dr. Burnett testified that the prisoner told him that McCormick said on Saturday night that he would dispossess him on Monday morning. That McCormick was in the saloon on that Saturday night, and said something on the subject of the prisoner's leaving the premises, is admitted by Kiernan in his testimony. On that night and after McCormick left, it is claimed by the prosecution that the prisoner fired his pistol, which had remained loaded for a long time, for the purpose of testing its reliability in a contemplated emergency. The prisoner says that he discharged it in his saloon, aiming at the floor; that he did this "a few nights before the Sunday of the alleged crime, but could not say exactly" what night, and when asked specifically if it was the Friday or Saturday night before, he answered: "Well, I won't say the exact night when it was." He added that when he went to McCormick's there were two unexploded

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cartridges in the pistol, a fact confirmed by the weapon itself after the shooting, in which were found one loaded cartridge, three discharged chambers, and one having no cartridge in it. The inferences to be drawn from this circumstance are adverse to each other, and peculiarly the subject for the consideration of a jury. It is quite probable that the weapon was discharged on Saturday night, as the prosecution claim, after the visit of McCormick. The prisoner puts the hour at eleven or half-past eleven o'clock, which was after the hour of that visit. The discharge of the pistol can scarcely have originated in other than one of two motives. The purpose was either to empty the weapon, and render it harmless; or to test its reliability after the length of time during which it had remained loaded, and ascertain its existing efficiency. If the first of these motives was the true one, and the prisoner meant to empty the weapon entirely, and supposed that he had, it is inconceivable that he should make no such explanation. Had that been true, his testimony would have been that he drew the pistol to frighten McCormick, and he did not suppose it was loaded. But no such explanation came from him. On the contrary, the theory he advances as a witness assumes a knowledge on his part that the pistol was loaded; for he claims to have fired it unintentionally. He says: "I didn't intend to fire it off." "The pistol went off, but I did not aim it at him at all." "When McCormick had close hold of me I fired; I did not mean to shoot it off." Those explanations are inconsistent with a belief on his part that the pistol was empty. If he had supposed that to be the fact, assuredly he would have said so, and stated his surprise at discovering that a charge remained in the weapon. Then, too, if on the night before he had supposed the pistol to have been emptied and rendered useless, why should he have put it back in his pocket, and carried it around with him, instead of laying it away, as it appears he had often done before? And why, also, on that supposition, should he have said, before firing the fatal shot: "You or me going to die?" These facts tend very seriously to disprove the infer-

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ence that the firing on the previous night was intended to render the weapon harmless, and so leave more probable the only other explanation that the prisoner was testing the pistol in advance; and, as we have already said, it was the province of the jury, reasoning upon the evidence, to choose between those conflicting inferences.

Passing now to the occasion of the killing, we have only the evidence of the prisoner and of the Italian to consider. That there was some altercation over the rent is made certain by both witnesses. The prisoner had with him money enough to pay the rent. He says he counted it out and offered to pay, but McCormick refused it. Either this must have been true, or the prisoner must have refused to pay the sum demanded, to account for the dispute which certainly arose. In the process of the altercation the Italian heard, as he says, the prisoner's threat: "You or me going to die." Whether the Italian told the truth, and whether, as a foreigner, he was sufficiently versed in our language to correctly understand what was in fact said, were subjects for the comment of counsel and the consideration of the jury. The latter heard the witness testify. They could judge how accurately or how imperfectly he understood the questions asked, and how well he could clothe his thought in the language of the country. That advantage we have not. The jury trusted in the truth and accuracy of the witness, and we cannot say that they erred in the conclusion, although to us it appears that they might well have hesitated. Assuming, therefore, as we must, the truth and accuracy of the witness, it becomes apparent that there was time enough during the dispute, and before the shooting, for deliberation and premeditation within the rule as we have often stated it, even if the jury did not believe that the fatal purpose was considered, and precaution taken for its success on the night before (*Leighton agt. People*, 88 N. Y., 117; *People agt. Majone*, 91 *id.*, 211; *People agt. Conroy*, 97 *id.*, 75). For the prisoner had time, not only to form the purpose in his mind, but to announce that intention to his victim, and then carry it into effect. After the

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shooting the prisoner left the house, pursued by the Italian, and turned upon him, presenting his pistol, and saying: "If you come any further, I give you one." Voorhies then pursued him, and he pulled up his pistol so that Voorhies could see it, and said: "I will stop you." And when asked, after his arrest, what McCormick had done to him, he declined to answer any questions. On this state of facts, we see no just reason for saying that the conclusion of the jury was without evidence, or unsupported by it. These were facts calling for great care on their part, and very serious reflection. The prisoner was shown to be, by a large array of evidence, quiet and peaceable in his character, avoiding rather than seeking disputes or violence, and making it somewhat a matter of surprise that he should have committed the crime. But he did kill McCormick, and upon all the facts a jury have pronounced their verdict. If they had found the prisoner guilty of murder in the second degree, we should have felt it to be a safer conclusion; but have no liberty to reverse their verdict.

The judgment of conviction should be affirmed.

All concur.

SUPREME COURT.

KANE agt. CLARKE

*Code of Civil Procedure, section 870.—Examination of party before trial—
What must be shown to entitle party to order.*

Where the complaint is on a promissory note and no answer has been put in, and it is sought to examine the defendant as to the consideration of the note, the plaintiff should show a reasonable expectation on his part that the consideration is to be denied, to entitle him to the order.

Oneida Special Term, February, 1885.

MOTION by defendant to vacate an order obtained by plaintiff for the examination of defendant under section 870. &c.

O'Dea agt. O'Dea.

Mr. Jenkins, for motion.

Mr. Brooks, opposed.

MERWIN, J.—It seems to me that this order cannot stand. The complaint is on a promissory note. No answer has been put in. The plaintiff seeks to examine defendant as to the consideration of the note.

There is nothing to show what the defense is to be. The plaintiff should, I think, show a reasonable expectation on his part that the consideration is to be denied. This he has not done.

Motion to set aside granted, with costs of motion.

COURT OF APPEALS.

JAMES J. O'DEA agt. MARY O'DEA.

Jurisdiction in Divorce Proceedings—Effect of a foreign Divorce.

Where defendant, a resident of Canada, was married in 1844 to K. in this state, and lived with him until 1860, when she returned to Canada, and he went to Ohio and there obtained a divorce for desertion. A copy of the summons was sent to her by mail, and she was present at the taking of the deposition, but took no part in it. She afterwards married plaintiff, he knowing the fact of her former marriage, and he now asks a divorce on the ground that she had a husband living at the time of her marriage.

Held, that the divorce obtained in Ohio was without jurisdiction, and so null and void, as was also the marriage in this state, and the divorce should be granted (DANFORTH, MILLER and FINCH, JJ., dissenting).

Decided December, 1885.

It appears by the complaint that the parties intermarried in this state on the 30th day of August, 1866, and from that time, until shortly before the commencement of the action in 1880, lived and cohabited together as man and wife. The husband.

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sued to have the marriage contract declared void, and the marriage annulled, upon the ground that at the time it took place a former husband of the defendant was living, and the marriage with him then in full force. The defendant, by answer, denied all the criminatory allegations. The referee before whom the issue was tried found, upon evidence sufficient, if admissible, that in July, 1844, the defendant resided in, and always before that time had been a resident of Toronto, Canada West, but at that date was married in Lewiston, in this state, to one K., and lived with him as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865, and he removed from this state "to, and became a resident of, Cuyahoga county, in the state of Ohio," where, in March, 1864, and after a residence of more than one year, he commenced an action in the court of common pleas of that county "for the purpose of obtaining a divorce from the defendant in this action, for the reason, as stated in the petition then filed, that she had been willfully absent from him for three years or more; that a copy of this petition, and of the summons issued thereon, were, on the 24th of March, 1864, sent by mail to the defendant at Toronto, where she then resided, and were received by her soon after; that by said summons she was required to answer in the action by the 9th day of April, 1864; that a notice of the filing of the petition, and of the purpose thereof, and that said petition would be for hearing at the May term of said court of common pleas, and that depositions would be taken in Toronto at a time and place mentioned, were duly published in a newspaper in said Cuyahoga county; "that on the 20th day of April, 1864, depositions in said action were taken in pursuance of said notice; that the defendant was present when such depositions were taken, but took no part, personally or by counsel, at the taking of the same; that no other service of the process or proceedings in the action was made upon the defendant than is above stated; and that such service, so made, was, according to the laws of the state of Ohio, a legal service upon the defendant, but that she never in any way appeared in

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said action." It also appeared that on the 24th day of May, 1864, the Ohio court, upon the proofs, found the facts stated in the petition to be true. That the defendant was willfully absent from the petitioner without cause, for more than three years anterior to the filing of the petition, and had at all times remained so willfully absent from him, and therefore it was decreed that the marriage contract alleged in the petition, and theretofore existing between the parties, be and the same was "declared annulled, canceled, and void, and no longer binding on the parties," and each "was restored to the rights and privileges of unmarried persons." The referee further found that the defendant afterwards married the plaintiff, and lived with him as above stated. It appeared from uncontradicted evidence that he knew the person he was about to marry had been a wife, and was not a widow; that he also knew of the divorce proceeding during its pendency, and in 1864 was informed of the result, but the referee finds that "he had no knowledge of the particular manner or circumstances under which the divorce was obtained;" and that when the plaintiff and defendant married, K. was living in Ohio, and is still living there. As conclusions of law the learned referee found that the court "of common pleas of Cuyahoga county, Ohio, never acquired jurisdiction over the person of the defendant in the proceeding prosecuted in that court, and therefore that the decree made and entered in it was without jurisdiction, and so void and of no effect." He directed judgment in favor of the plaintiff, declaring his marriage with the defendant to be illegal and void. After judgment, it was reversed by the general term, and a new trial granted. From that order the plaintiff appeals.

George J. Greenfield, for appellant.

De Lancey Crittenden, for respondent.

PER CURIAM.—We think the *Case of Baker* (76 N. Y., 78) is conclusive on the question brought up by this appeal, viz.:

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Whether the court in the state of Ohio had jurisdiction to try the issue raised by the petition of K., as between him and his wife; she then being a non-resident of Ohio, and never a resident of that state, nor at any time there served with process of the court. There are some differences in the details of the circumstances of the two cases, but we think not enough to lead to any change in the result, nor sufficient to require a reconsideration of the law affecting it. The *Baker Case* was of great importance, involving, as it did, the liberty of a citizen. It was most fully argued, and we do not perceive that the discussion in the case at bar has developed any new principle, or brought to light any authority which was not then weighed by us. We do not think the question can be more fully investigated. Concerning the result there was, it is true, a dissent by the late learned chief judge, and the opinion recognized the fact that in other states judgments contrary to the authorities followed in this state had been rendered. This conflict of opinion, however much to be regretted, continues, and it yet remains for some ultimate authority to relieve the point from the difficulties now attending it, and determine the civil rights of parties whose relations, as legally defined by different state tribunals, are liable to be regarded on one side of the state line as matrimonial, and on the other side as meretricious.

Adhering, however, to the rule established in this state, a majority of the court are of opinion that the order appealed from should be reversed, and the judgment of the special term affirmed, but without costs.

RUGER, C. J., RAPALLO, ANDREWS and EARL, JJ., concur.

DANFORTH, J. (*dissenting*).—The jurisdiction of the supreme court to grant the relief sought for in this action is purely statutory (*Code, sec. 1745*), and depends upon the existence of two facts there stated, and in substance repeated in the complaint: (1) That the former husband was living at the time of the marriage in question; and (2) that the marriage between that former husband and the defendant was then in force.

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As to the first, there is, upon the evidence, no dispute. The controversy is over the second, and is to be determined as effect is given or denied to the judgment rendered by the Ohio court. In *Kinnier agt. Kinnier* (45 N. Y., 535), full effect was given to a judgment of divorce granted by a sister state, although for a cause not deemed sufficient in this state; while in *People agt. Baker* (76 N. Y., 82), it did not avail the defendant who set it up. In the *Kinnier Case* the plaintiff was the second husband, and unsuccessfully invoked the judgment of the courts of this state to annul his marriage. There both parties to the divorce proceedings were in the state when they were had, and parties to the suit. In the *Baker Case* the defendant was served with process by publication only, and his second marriage was held to be bigamous. The present suit was commenced soon after the determination of the *Baker Case*, and, as stated on the argument, was suggested by it. The learned counsel for the appellant now relies upon it as furnishing a decisive answer to the decision of the court below.

The judgment in *Baker's Case* (76 N. Y., 78), was in assumed compliance with the rule theretofore uniformly laid down by the courts of this state, and is to be followed as a precedent in similar cases, but it should be taken in connection with the facts which seemed to warrant it, and, so taking it, I feel at liberty to dissent from the conclusion of the majority of the court in the one at bar, and more readily because a limitation to the doctrine appears to have been in the mind of the court in that instance. In the language of the learned judge, whose opinion declared the views of his brethren: "It presents this question: Can a court, in another state, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in this state? We assume, in putting this proposition," says the learned judge, "that the defendant in error was in the situation therein stated.

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We think," he adds, "that it may properly be thus assumed." And that importance was attached to this assumed situation of Baker is apparent, not only from the care taken in stating the proposition, but by the argument by which it is sustained in the face of some evidence to the contrary.

It appears, then, in the *Baker Case* (1), that the person whose rights the court in Ohio sought to affect is not only characterized as being at the time a citizen of this state, but as one actually abiding here during the judicial proceedings which were aimed at him. In the case at bar the defendant in the divorce suit was neither domiciled nor a resident in this state, nor was she within its borders during the pendency of the proceedings therein. She was either domiciled in Ohio, because her husband's domicile was there, or she was domiciled in Canada, to which place she went, and where she resided. The latter place it is said was her domicile of choice. Assuming that to be so—that her husband's domicile was in Ohio, and her own in Canada—the question is, whether the proceedings instituted by him were valid by the laws of those two places. Valid by the laws of Ohio they are conceded to have been, and there is no finding or evidence that they were not valid also by the laws of Canada. (2) In the next place there was in the *Baker Case* no notice of the proceedings save by publication. It is clearly implied, in the proposition I have quoted, that if (1) the defendant had voluntarily appeared in the divorce suit; or (2) been personally served with process in the state where it was pending; (3) had actual notice of the suit—a different conclusion would have been warranted and effect given to the judgment of the Ohio court. The whole argument of the learned judge was to show that the admission of the judgment of a court of a sister state to credit and effect in another was subject to limitations, and that it could be received only when it did not violate those principles which morality, or its standard of public policy, or municipal regulations, require to be specially observed in the state in which the party relying on the foreign judgment had chosen to introduce it. "There is no principle of comity,"

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he says, "which demands more;" and so the ultimate question is treated by him as one of expediency, but requiring, nevertheless, the rule of the foreign law to be adopted. "*Quotinus sine prejudicia indulgentiam fieri potest.*" It was not intended to deny the well-settled rule that where judgment has gone against a party in the state of his residence, or where, not being a resident, he has voluntarily appeared in the action, or where he has been served with process within the state where the action is pending, and so has been brought under the authority of its courts, then, under the provisions of the constitution (*art. 4, sec. 1*), and the act of congress (*U. S. Rev. Stat., sec. 905*), the judgment is of the same force and validity in other states as in the one where it was rendered. But where the jurisdiction of the court rests only on the fact that the moving party had his domicile within such jurisdiction, its claim to recognition in other states rests on the ground of comity, and this cannot prevail where the judgment sought to be accredited has been rendered without giving the party to be affected an opportunity to be heard. But, as I understand the *Baker Case*, it concedes that this rule does not inexorably require either service of process or voluntary appearance, but may be satisfied when the party has in any way been given an opportunity of being heard before judgment; or, in the language of the third condition of the question stated (*supra*) in the *Baker Case*, has had "actual notice" of the judicial proceedings.

In *Doughty agt. Doughty* (27 *N. J. Eq.*, 315; *S. C.*, 28 *id.*, 582), the court treat the question of jurisdiction in a divorce suit arising out of the *status* and domicile of one of the parties, in the same spirit in which it is treated in *Baker's Case* (*supra*), and cite the New York authorities; but the court say: "A judgment of divorce, proceeding from a jurisdiction founded on domicile, would not contravene essential rules of natural justice if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant out of the jurisdiction in which a suit is pending may add nothing to the judicial right to take cognizance over the cause, but,

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nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction," and refuse to accept the one then in question, for reasons like those given in *Baker's Case*, saying: "The residence of the defendant to it was known. She was not summoned, she did not appear, and she was not served with process, nor was notice given to her."

Indeed, as the object of all service is to give notice to the party on whom it is made, that he may be aware of and may resist the relief sought against him, when that is substantially done, so that the court may feel confident that service has reached him, it would seem that everything has been done that is required. This is said in *Gibbs agt. Insurance Co.* (63 N. Y., 114, 127), and is repeated in *Pope's Case* (87 N. Y., 137, 140), with the addition that any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law. Indeed, it is difficult to see how it could be otherwise. We hold it enough, within the strictest rule, to serve process upon a defendant, although he is in transit; passing through the state, neither abiding there, nor having any intention to remain. Of what less real and substantial efficacy, for all beneficial purposes, is the actual delivery of the paper outside the limits of the state? So, as against a domiciled citizen of a state, a judgment rendered upon such substituted service is, by the law of the state, permitted, although he is, in fact, absent, and it is valid and binding upon him, though he is actually abiding in another state, and has neither appeared in the suit nor had actual notice of it. His absence, whether temporary or prolonged, makes no difference (*Hunt agt. Hunt*, 72 N. Y., 217). The same principle of comity is applied in favor of one claiming title under a foreign law, as *In re Waite* (99 N. Y., 433; S. C., 2 N. E. Rep., 440), where, after a most exhaustive and elaborate examination of authorities, it was decided, upon those and upon principle, that while the statutes of foreign states have no force or effect within this state, and hence the statutory title of foreign assignees in bankruptcy can

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have no recognition by virtue merely of its origin, yet that the comity of nations permits a certain effect to be given to titles so derived, when it can be allowed without injustice to our own citizens. So, in many other instances, effect is given, by way of comity, to the laws of other states, as in recognizing an administrator or guardian appointed under another jurisdiction. He may not act *de jure*, but it does not follow that his claim to property or to the care of a minor is to be denied.

In the case at bar it was shown that the process from the Ohio court was actually delivered to the defendant, and received by her, and, moreover, that she was personally present at the taking of depositions in the case on the part of the plaintiff; going thither, the proof is, "because she had been notified." Now, although it may be said that, within the strict rules of law, she was not made a party to the adjudication, it cannot be doubted that, under the argument in the *Baker Case*, and the authorities to which I have referred, the defendant had all the notice which reason and natural justice requires should be given, and that by it all danger of imposition upon the party or the court was excluded.

(8) In another respect, although of much less importance, there is a third difference to be noted in the relation of the two cases to our law. At the time of the decision of the *Baker Case* (January 21, 1879), an order for service by publication, or without the state, in a divorce case, could only be had "where the defendant is a resident of the state" (*New Code*, sec. 438, sub. 4), and to that fact reference was made in the opinion; but those words were, by a subsequent amendment—*Laws 1879*, June 20 (*Sess. Laws 1879*, chap. 542)—stricken out, and the law restored to its original condition, so that now judgment in this state may be rendered against a non-resident defendant in a matrimonial action either for a separation, a divorce absolute, or an annulment of a marriage, upon service of the process upon him or her outside of the state, or by publication. It is apparent, therefore, that the subject was before the legislature for deliberate examination, and their conclusion will not permit us to

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say that public policy is opposed to such proceedings as those in Ohio, now under review; for it authorizes the doing in this state of the same thing, in the same manner, and with the same object. Moreover, as if to remove any inequality in applying it, and relieve the married woman from the traction of that legal fiction by which she is supposed to follow and be with her husband, although in fact separated by intervening continents, it provides that if she dwells within the state when she commences an action for divorce or for separation, she is deemed a resident thereof, although her husband resides elsewhere (*sec.* 1768). It also directs judgment when default occurs in appearing or pleading, whether the summons and complaint has been personally served in the state, or whether service has been made by publication, and this is so whether the action is to annul the marriage, or for a divorce, or a separation (*sec.* 1774). The law of procedure under which the Ohio court acted was precisely like our own, and I can find no circumstances in the case which require us to depart from the rules of comity, which exact consideration for the laws and judicial proceedings of other states, and on which we depend for respect to our own.

I have so far looked at the case from the appellant's standpoint, and treated the rights of the respondent as if she had made herself in Canada a domicile separate from that of her husband. Even in that view, I think the learned court below committed no error in holding that there was no substantial ground upon which the plaintiff could invoke its interference, and that the case was not one which required the marriage between these parties to be annulled. But another, and I think correct, statement of the respondent's position, permits us to say that her domicile was, at the time of the divorce proceedings, with her husband in the state of Ohio; and in that respect, also, the case differs from the *Baker Case*. Except as altered by statute, the rule of the common law, which identifies the married woman with her husband, is adhered to by the courts of this state, and upon the question now before us its decisions require us to hold that the domicile of the husband is *prima*

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facie that of the wife, not only because the home of one is the home of the other, but because it is her duty to go with him where he goes, and dwell with him where he dwells. Indeed, under the maxim referred to, it could not be otherwise. One in person, and that person the husband, the common law by no fiction could give her a separate domicile, nor even admit of its possibility. Therefore, in *Baker's Case*, the wife, plaintiff in the divorce proceeding, in theory of law had her domicile with her husband, and thus both were residents and citizens of this state. In the case before us the husband was a legal citizen of Ohio, and the defendant's domicile, by virtue of the same theory, also in that state. But in *Hunt* agt. *Hunt* (*supra*), it is said that, "from necessity," "she may, in certain cases, have a domicile in another jurisdiction than that of her husband, as when they are living apart, under a judicial decree of separation, or when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce," and so the reason of the rule weakens in power when, in extreme cases, the conduct of the husband has been such as to make it proper for the wife to seek relief from her obligation to have the same home and interest with him, and altogether ceases when a judicial decree has separated and adjudged them to live apart. These exceptions are justified, the first upon the ground that otherwise "the husband might constantly change his domicile, and, drawing that of his wife after him, prevent her finding a court having that jurisdiction of person which would enable her to try her suit for redress and relief." "It is evident," says the learned judge, "that this reason," by which I understand him to mean the *reason of the rule*, viz., the theoretic identity of person and of interest between the husband and the wife in the eye of the law, "will also operate in favor of the husband, so that, where he has ground for a suit by reason of the misconduct of the wife, she may not so often change her domicile as to baffle him in his pursuit of a remedy."

Now, in the case before us, no ground can be found upon

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which either exception can be placed. By deliberate stipulation in this case, it is conceded that the defendant in the Ohio suit, that is, the wife, left her husband, the plaintiff in that suit. No fault or error in behavior, or bad treatment on his part, is suggested. On the contrary, the record shows that at the time of the commencement of the suit, in December, 1864, she had been willfully absent from him for more than three years; that he had applied to her to live with him, and she had refused to do so; that always, while they lived together, he had provided well for her and treated her properly. The referee also finds that she left her husband. He did not go to Ohio to evade the law, nor to procure a divorce, nor to draw her from a friendly jurisdiction. She left him. He went to Ohio in good faith to reside, and acquire a domicile, and he has since resided there, now nearly twenty years. So far as appears he was without fault, and the removal of his wife entirely without cause, and willful. Upon what ground, then, has she acquired a separate domicile?

The chief case cited by the appellant is *Borden agt. Fitch* (15 *Johns.*, 121), which is relied upon as "an express decision to the effect that the acquisition of a new domicile by the husband does not draw the wife into the same jurisdiction." It furnishes no exception to the rule laid down in *Hunt agt. Hunt* (*supra*). Fitch and his wife were inhabitants of and domiciled in Connecticut. They lived together there until October, 1808, when, upon her application and notice, and appearance and contest by him, the general assembly of that state, for abundant cause, decreed a separation at her pleasure, with, to her, "the privilege of a *feme sole*," and alimony to be paid by him annually. At all times after, she continued to reside there, but in 1818, upon an allegation that she had willfully deserted him, he obtained in Vermont a decree of divorce. He afterwards married in this state, and was shortly afterwards sued by the second wife's mother for debauching her daughter. He relied upon the Vermont divorce, but without success; the court holding that the act of the legislature of Connecticut should be deemed a divorce

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a *separatus et thora*, and involved a legal separation, and so the case was brought within the first exception I have referred to, viz., a separation by judicial decree, or, what is of equal or greater effect, a legislative enactment.

I do not think it necessary to inquire how the case would stand if the husband had deserted his wife. Such a case is not before us. Until we are prepared to give up the common-law rule, as respects the relation and unity of man and wife, we cannot hold that the wife, at her pleasure and without cause, may establish a separate residence or a domicile beyond the man's control. It may be conceded that a judgment obtained as was the one we have considered, would be of no effect as against the person, nor as one *in rem*, except as it was enforced or took effect within the state; but it cannot be doubted that the courts of Ohio had jurisdiction over the plaintiff, K., and over the subject-matter of the suit instituted by him. The judgment had force within that state, not only as to him, but the defendant should she go therein. No marital right could be claimed by her. Moreover, by marriage a *status* is acquired which implies, not only membership in a family, with certain rights, but a relationship in which the state is interested, and which, therefore, is subject to its control; and, however regarded, it is apparent that a judgment in the rendering of which the court exercised such jurisdiction as it did in this case must have a very different influence from one of any other character. The distinction is conceded in the cases before referred to (*Hunt agt. Hunt*, *People agt. Baker*, *supra*), and distinctly declared in *Pennoyer agt. Neff* (95 U. S., 714), where the effect of judgments obtained without personal service of process, in actions against the person or property, or to establish a *status*, is considered. In the first it is said to avail nothing; in the second, to be good against property within the state whose courts render it, but not out of it; in the last, to determine the *status* or condition of the resident by dissolving the marriage tie, and, therefore, necessarily precludes the other party from asserting, or any court in

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any state from holding, that the marriage so dissolved exists or is in force.

It follows, I think, that the true and safe rule is as stated by *Cooley on Const. Lim.*, 400, that the actual *bona fide* residence of either husband or wife within a state will give to that state authority to determine the *status* of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, and that the courts of that state, authorized by its legislature to take cognizance of the subject, may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law; that jurisdiction over the opposite party may be acquired in such manner as the legislature may direct, and, whether by service in or notice out of the state, or by publication, is sufficient to justify a decree changing the *status* of the complaining party, and thereby terminating the marriage. By holding otherwise we declare our own statutes (*Code Civ. Pro.*, § 438, *sub. 4*, and § 1774) upon the same subject unavailing, and compliance with them a useless and idle formality.

There is another proposition yet to be considered and answered in his favor before the plaintiff can succeed on this appeal. The *Baker Case* (*supra*), however much or little it may be regarded as differing in principle from the one before us, brought before the court a very different case, arising under a different statute. His conviction for bigamy was upheld because he contracted a marriage in this state in violation of the act concerning divorces, and for the purposes of that act, and proceedings for its violation, and the punishment of bigamy, it was evidently thought immaterial whether his first marriage was "in force" or not. Referring to the claim urged for the prisoner, that our laws permitted such proceedings as were had against him in the Ohio court, the learned judge says: "This is but to say that, on the principle of the comity of states, we should give effect to this judgment. "But," he continues, "this principle is not applied where the laws and judicial acts of another state are contrary to our own public policy, or to abstract justice or pure morals. The policy of this state always

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has been that there may of right be but one sufficient cause for divorce a *vinculo*, and this policy has been upheld with strenuous efforts." The divorce in question was not for that cause, and it was not to be recognized. Under those laws a person whose guilty act has made divorce possible cannot marry a second time, if merely the former wife or husband is living (2 *R. S.*, 39, *secs.* 5, 6). Those are the words of prohibition, and, to bring a party within them, it is necessary only to show (1) a prior marriage; and (2) that the parties thereto are living. "It does not import that the relation still continues, or, on the other hand, that it has ceased. Upon that point it is silent, but limits the inquiry to the dry fact whether the person with whom the prior marriage was contracted still lives at the time of the subsequent marriage" (*Cropsey agt. Ogden* (11 *N. Y.*, 238). In that case, in answer to the claim of counsel that the prohibition of the fifth section should be read as if it said "during the life-time of any husband or wife to whom the party was formerly married," the court declined to do so, saying: "The meaning would be very much altered if we should yield to the request. So read, it would or might import that the relation of husband and wife must still continue between the former husband and wife, at the time of the subsequent marriage," adding: "The word 'former,' as used in the section in question" (*sec.* 5), "imports that the relation of husband and wife once existed, but neither affirms its existence nor denies its termination."

The prohibition, then, relates to the case of either party to a marriage whenever and wherever contracted, both the parties to which are living, and prohibits either to contract a second or subsequent marriage during the life-time of the other, except in certain specified cases. This construction has recently been approved with great significance in overruling *Hovey's Case* (5 *Barb.*, 117), where it was held by the supreme court that, after the dissolution of a marriage for adultery, the marriage contract was at an end, and the relation of husband and wife no longer existed between the parties; and if the guilty party marries again he is not within the penalty of the act against

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bigamy; but *Faber's Case* (92 N. Y., 146), we held that, for the purpose of enforcing the statutory prohibition, a person against whom a divorce has been obtained, is regarded by the statute as having a husband or wife living so long as the party obtaining the divorce lives, and that a conviction could be had, although the former marriage had been dissolved. Whether the former marriage was in force or not at the time of the offense, then was entirely immaterial. The statute (*Code Civ. Pro.*, sec. 1742) brought before us by this appeal permits no such construction. It adopts the language of the former statute, but adds a new term to it. "An action," it declares, "may be maintained to procure a judgment declaring a marriage contract void, and annulling the marriage, if" at the time of the marriage "the former husband or wife of one of the parties was living," and the marriage with the former husband and wife was then in force. This last condition requires the interpretation which the court, in *Cropsey agt. Ogden* (*supra*), refused to give to the one first referred to. One is satisfied with the fact of a former marriage, and the present existence of the parties; the other requires as much, viz: (1) A former marriage; (2) the the present existence of the parties; and, also, (3) that the former marriage itself be then in force. Now, in *Baker's Case* (*supra*), the court says (p. 84): "We must and do concede that a state may adjudge the *status* of its citizens towards a non-resident, and may authorize, to that end, such judicial proceedings as it sees fit, and that other states must acquiesce so long as the operation of the judgment is kept within its own borders."

So is the whole argument of the learned judge. Hence, he says: "If one party to a proceeding is domiciled in a state, the *status* of that party, as affected by the matrimonial relation, may be adjudged upon, and confirmed or changed in accordance with the laws of that state."

The claim was indeed made that the state where the other party was domiciled, might exercise over him or her the same jurisdiction, and so apply the statute against bigamy. But that does not contain the governing words of the other. And even

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if, within that opinion, the courts of Ohio could not declare the *status* of the defendant in this state, it could and it did lift the marriage yoke from off the neck of its citizen, relieved him from the "*vinculum matrimonii*," and hence, although the parties to the former marriage still lived, one of them was confessedly relieved from all his marital obligations and legally disabled from enforcing those of the other. She had no husband, at least, in the state where he lived. The contract was no longer binding on him. It follows that the former marriage cannot be said to have been in force at the time of the marriage which is the subject of this action.

When the statute speaks of a "marriage then" (at the time of the second marriage) "in force," it must mean a marriage by which both parties are bound, and as to which the relation of neither party has been changed. What is the allegation of the plaintiff here—his whole case? That K., living in Ohio, is the husband of the defendant, and the marriage "in full force." Neither assertion is true. As to K. it must be conceded, under any aspect of the case, the marriage is dissolved, and, under any view of the law, that he is discharged from the marriage bond. The judgment operates upon him in Ohio, attaches to and determines his relation and character. In *Moore agt. Hegeman* (92 N. Y., 521), commenting upon a similar statute of New Jersey, it was said to be very clear "that it had in contemplation a wife or husband who had not been divorced, and who was invested with all the marital rights conferred by a lawful marriage." If I am wrong in supposing that the facts of this case are not enough to bring it within the proposition on which the opinion in *Baker's Case* (*supra*) stands, then the defendant here might be found guilty of bigamy, because the policy of our law recognizes no divorce save for one cause, and that not the one alleged against her. But there is nothing in that decision which requires us to hold that the former marriage was in force when the second was solemnized. On the contrary, the necessary result of the opinion is that the Ohio decree was good, as changing the *status* of the wife, but not effective in this state to protect

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her from the imputation of bigamy. If the *status* of the wife was changed, the marriage was not in force; and, in view of these conflicting conditions, the learned judge recognizes the hardship of being "a husband in name and under disabilities or ties in one jurisdiction, and single and marriageable in another." If the law is to be so rendered, and this defendant put in that position, it will still remain that the plaintiff's case was not brought within the plain language of the statute. It certainly cannot be said that the former husband, as to whom, even under the doctrine of the *Baker Case*, the dissolution of marriage is absolute, can in any degree be held united to the defendant by the tie which such a relation implies. I think the decree put an end to the contract. But if it had only a partial operation, the marriage cannot be said to be in force; and that the statute requires as a condition of jurisdiction.

One other question remains: Was the evidence on which the referee put his decision competent? Public policy forbids that a marriage should be dissolved either by the mere consent of the parties thereto, or by a judicial proceeding which has no other foundation than their admissions. Were it otherwise, the morals of the community would be easily corrupted, and the forms of law made effectual in the profanation of marriage. Therefore the Code, which has changed the common-rule as to the competency of witnesses in civil actions, forbids husband or wife testifying, in an action for divorce on the ground of adultery, to any matter save their marriage. What cannot be done by their testimony should not be done indirectly by any act of theirs, neither by admission in pleading, nor by stipulation of counsel. Here we find no evidence of the fact of the former marriage. The pleadings, indeed, concede it, and counsel have stipulated that it took place. Neither of these things can have any efficacy, except as they were authorized by the parties; and their admission or statement, however formally expressed, should have no effect when their testimony as witnesses is excluded. Neither will the law permit such a judgment by default, although in other actions the silence of

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the defendant is effectual as an admission in favor of the plaintiff. The fact pleaded, and the fact stipulated, is the vital one in the case, and to permit a divorce under such circumstances is practically to concede that a relation in the continuance of which the state has an interest may be dissolved, as it was formed, by the simple agreement of the parties.

I have examined the cases which, as cited by the appellant, seemed to bear upon this question, but find none which requires a different conclusion from the one expressed. In my opinion, therefore, the learned court below did not err under the circumstances of this case, in whatever aspect they may be viewed, in refusing to annul the marriage between the plaintiff and the defendant. They might well hold that the plaintiff's case was not proven, or, if there was irregularity in the proceedings of the court of Ohio, waive it in a spirit of comity, and accredit the judgment, rather than pronounce a relation which for nearly twenty years the parties treated as lawful, to have been adulterous. They might also hold that the judicial proceedings in Ohio were effective, and that the interest of society, and justice to the parties, required that respect should be given them.

I think the order appealed from should be affirmed, and the defendant have judgment absolute, dismissing the complaint.

MILLER and FINCH, JJ., concur.

Throop Grain Cleaner Company agt. Smith.

SUPREME COURT.

THE THROOP GRAIN CLEANER COMPANY and HIRAM K. EDWARDS, sheriff of Onondaga county, plaintiff, agt. H. CORDE-
NIO SMITH, defendant.

Contract for the sale of personal property—When the title to a demand passes to the vendor—Attachment—When lien created by levy—Whether a transfer has been effected, a mixed question of fact and law—Check or draft—Assignment—How much must be done to make an effectual assignment of an account—Code of Civil Procedure, sections 677, 678, 679—Attaching creditor—Action by him to collect the demand attached—He cannot impeach the good faith of the transfer of the demand.

Where an action is brought by an attaching creditor jointly with the sheriff who levied the attachment, against a creditor of the defendant in the attachment, to recover a claim attached, in aid of the attachment, pursuant to sections 677, 678 and 679 of the Code of Civil Procedure, and which is defended upon the ground that the demand was assigned prior to the levy of the attachment, it seems inquiry cannot be made into the question whether or not the transfer was fraudulent as against the attaching creditor.

No lien is created by the levy of an attachment upon a claim, unless the legal title to the demand is in the attachment debtor at the time of the levy.

Where there has been no formal transfer of the title to a demand levied upon under an attachment, it becomes a mixed question of fact and of law whether or not a transfer has been effected.

In such a case, whether or not a present appropriation of a debt or demand has been effected, so as to constitute a legal or an equitable assignment, is a question of intention, to be submitted to the jury, as matter of fact, for their determination, upon the language used by the parties, written or verbal, and the surrounding facts and circumstances.

A check or inland bill of exchange, drawn in the ordinary form, not describing any particular fund or using any words of transfer of the whole or any part of a demand standing to the credit of the drawer, does not operate as an assignment, either legal or equitable, of such demand, to have the effect of an equitable assignment, the draft must be drawn on a particular specified fund or demand.

Where the drawer of a draft for a demand due from the drawee delivers the draft to the payee, accompanied with propositions of sale, which are ac-

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cepted by the payee, and their minds meet on the terms of the bargain, and the draft is delivered and received as a mode of effecting a transfer of the title of the claim against the drawee, the title would pass, although the drawee refused to accept the draft. But the delivery of the draft alone, without any arrangement relative to a bargain and sale of the demand, or the delivery of the draft, accompanied with propositions of sale, not accepted by the payee, would transfer neither the legal or equitable title to the demand.

A draft made and delivered to the payee for the purpose of transferring the title of a claim due from the drawee, and the payee parts with no value, and relinquishes no rights against the drawer, the draft will not pass the title or affect an equitable assignment of the demand.

A *chose in action* may be assigned by parol, but to constitute such an assignment, there must be a surrender of all control over the demand by the creditor, and the appropriation of it by the purchaser must be absolute and unqualified.

Where on a proposed sale of a demand no part of the purchase price is paid by the purchaser, an agreement that the price shall be applied to a precurrent debt owing by the seller to the buyer, does not amount to a payment of the purchase money as required by the statute of frauds, unless actually applied by giving a receipt or otherwise.

How much must be done to make an effectual assignment of an account, *query*.

Under a contract for the supply of a quantity of machinery, the purchaser is under no obligation to make any payment until the contract has been fully performed and the whole of the machinery delivered, and until then the purchaser does not become a debtor under the contract.

Fifth Department, General Term, January, 1886.

THIS was a reargument of a motion on the part of the plaintiff, after nonsuit, for a new trial upon case and exceptions, ordered to be heard in the first instance at general term. This action was brought on the 9th day of July, 1881, by authority of an order granted on that day, upon application made therefor, as a provisional remedy, under title 3 of chapter 7 of the Code of Civil Procedure, in aid of an attachment, in the names of the plaintiff in the attachment and the sheriff who executed the attachment, jointly, as plaintiffs, against the defendant, a debtor of the defendant in the attachment, to recover a claim attached in the hands of the defendant, as such debtor, and

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reduce it to the possession of the sheriff, to answer any judgment that might be recovered in the attachment suit.

The plaintiff, the Throop Grain Cleaner Company, brought an action on the 6th day of May, 1881, in this court, for Cayuga county, by attachments against one Edward P. Allis (trading and doing business under the name or style of E. P. Allis & Co., at Milwaukee, Wis., his place of residence), as defendant, to recover the sum of \$4,000 and interest, due on a contract for the manufacture, by Allis, of certain milling machinery.

This defendant, Smith, who resided in Onondaga county, was indebted to Allis in the sum of \$4,100 for certain milling machinery sold and delivered to him by Allis, under the following agreement:

"This indenture, made this 4th day of April, 1881, by and between Edward P. Allis & Co., of Milwaukee, Wis., parties of the first part, and H. C. Smith, comprising the firm of H. C. Smith, of Marcellus, N. Y., party of the second part,

"Witnesseth, that the said party of the first part, in consideration of the sum hereinafter stated, to be paid to them by the party of the second part, at the times and in the manner hereinafter stated, agree to manufacture and furnish, at Milwaukee, Wis., f. o. b. cars, all to be good material and workmanship, the following articles, to wit:

"Three double set of corrugated rolls, in Gray's pat. noiseless frames.....	\$1,800 00
Two double set of smooth iron rolls, in Gray's pat. noiseless frames.....	1,000 00
Four No. 1 Smith purifiers, C. \$350, less 25 per cent.....	
Doufour's bolting cloth, 20 per cent disc. price list.	

"E. P. Allis & Co. guarantee H. C. Smith that the three double set of corrugated rolls will reduce the wheat and clear

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the bran for 100 to 125 barrels of flour in twenty-four hours for winter wheat.

"Also that Mr. Gray shall visit the mill.

"And they also agree to furnish plans of the arrangement of machinery and work at cost within thirty days from this date, if so desired.

"And the party of the second part hereby agrees to pay for said articles as follows, to wit:

"Cash on receipt of goods.

"It is hereby agreed that said E. P. Allis & Co. are to use their best endeavors to have said articles ready for shipment at the time stated herein, and also that they shall be of a stated quality, but they are not to be held liable for any pecuniary damage in either case, except to make good any unmerchantable defect which may be proved to exist in said articles when furnished.

"In testimony whereof, the said parties have hereunto set their hands this 4th day of April, 1881.

(Signed.)

"EDWARD P. ALLIS & CO.

"H. C. SMITH.

"Witness:

"W. D. GRAY.

"L. V. RATHBUN."

The attachment was issued to the sheriff of Onondaga county, one of the plaintiffs herein, and delivered to him on the 7th day of May, 1881.

The sheriff, on the same day, levied the attachment upon a part of the machinery sold and delivered by Allis to Smith under their contract, in the hands of the railroad company as the property of Allis, the title to which, in an action brought by Smith against the sheriff to recover it, was held by this court in *Smith agt. Edwards, sheriff, &c.* (29 Hun, 439), to have previously passed to Smith.

On the 21st day of May, 1881, the sheriff levied the attachment upon the *claim* due Allis from Smith as the purchase

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price of the machinery under their contract, in the hands of Smith, who had not paid the same, in the usual way by making demand, serving a certified copy of the warrant, giving notice, making and filing inventory, &c. Smith refused to pay the claim to the sheriff and *retained* the money due thereon.

Service by publication was made upon Allis in the attachment suit, and on the 16th day of August, 1881, judgment was entered and docketed therein in Cayuga county against Allis for \$4,364.48, and a transcript thereof entered in Onondaga county and execution issued thereon to the sheriff of that county on the 17th day of August, 1881, who, on the same day, demanded payment upon such execution of the claim levied upon under the attachment, to secure payment of the judgment from the defendant Smith, who had not paid the claim to any one, and in whose hands it was attached, who refused to comply with such demand, and thereupon this action was brought.

In answering, the defendant alleged, as the principal defense, the assignment of this claim against him by Allis to the Farrell Foundry and Machine Company of Ansonia, Conn., prior to the issuing of the attachment, or the levy of said claim thereunder, or the execution thereof, and that such assignment was made in good faith, and for a valuable consideration, and vested the title to the claim in the Farrell Company, and that Allis then had no interest in the claim.

This transfer was attempted to be effected by means of two ordinary drafts, drawn on the 10th day of May, 1881, by Allis on Smith, payable to the order of the Farrell Company, one for \$1,050 and one for \$2,800, and mailed to the Farrell Company on that day inclosed in a letter of that date, and to be emphasized by two letters written and mailed on that day by Allis, after the letter inclosing the drafts, one to Smith and one to the Farrell Company, by a letter received from the Farrell Company by Allis & Co., dated May 13, 1881, and by the testimony of Allis and his son asserting a prior indebtedness from Allis to the Farrell Company, exceeding the amount of the

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drafts, that credit was given Allis for the drafts, and that Allis acted in good faith in making the drafts and turning the claim over to the Farrell Company.

It appears that Allis and the Farrell Company had dealings and stated periods for accounting, the Farrell Company on the first of each month sending Allis a monthly statement for the preceding month, and Allis settling as per such statements with his notes, &c., it being a settlement once a month. These two drafts do not appear on the monthly statements of the Farrell Company either for May or June. On December 19, 1881, seven months after the claim was attached, an examination of the books of the Farrell Company was made, and these two drafts did not appear, nor had credit been given Allis for them. On the 9th day of June, 1881, after the attachment was levied upon the property, Smith notified Allis, at Milwaukee, by telegram of the seizure. On the 10th day of May, 1881, after receiving such notice, and with full knowledge of the attachment suit, Allis and his son had a consultation for the purpose of devising some scheme whereby the Throop Company might be defeated from levying the attachment upon this claim, and as a result thereof, these drafts were made and letters sent to the Farrell Company. Prior to this there had been no communication in any form, between Allis and the Farrell Company, regarding the Smith claim or the transfer thereof. Two drafts were made because all the machinery had not been delivered, and the smaller draft, representing the property delivered, Smith would pay at once, but the other he would not pay until he received the balance of the property. The balance of the property was not delivered until after the claim was attached. The drafts were not paid until September 10, 1881, and after this action was commenced. The drafts were forwarded for collection for Allis by the Farrell Company, as directed by Allis and in accordance with the instructions given by Allis to Smith, for their payment on the 16th day of May. After the drafts were received by the Farrell Company, Smith requested Allis to allow in reduction of the drafts a claim for commissions on

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the machinery he had purchased, due one Rathburn, and which he had paid, of \$385. And Allis made the reduction on the 17th day of May. Allis consulted with and sent his attorney, and went himself to Syracuse after the levy of the attachment, to arrange to contest the attachment, arranged with the Farrell Company for and provided the indemnity to Smith, under which he was induced to pay these drafts, and retained, instructed and paid the attorneys who represented Smith in the action to recover the property attached, and in the defense of this action, directed and controlled every step that was taken, from the time the attachment suit was commenced, May 6, 1881, to the time the claim was finally paid by Smith, on September 10, 1881, four months after the claim was attached, in the hands of Smith, and after the claim was paid to the Farrell Company, prior to which time no credit had been given for it, or application made of it to Allis, by the Farrell Company. Allis directed the money applied on his notes, coming due the 12th and 18th of September, and the Farrell Company desired to apply it on the note of Allis, coming due October 1st. What was done with the money does not appear. As late as the 19th day of December it had not passed to the credit of Allis on the books of the Farrell Company.

After the evidence was closed, the defendant moved for a nonsuit, on the grounds—

First. That the complaint was unproved.

Second. That the evidence was undisputed, that the attached claim was transferred, accepted and Smith notified of the acceptance, and hence, there was nothing upon which the attachment became a lien by being served.

The plaintiffs, on the contrary, insisted and submitted—

First. That it appeared there had been no transfer of the claim, and that upon the evidence they were entitled to have the jury instructed to find a verdict in their favor.

Second. That they were entitled, upon the whole evidence, to go to the jury upon the question whether there had been any transfer at all of the claim attached.

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Third. That they were entitled, upon the whole evidence, to go to the jury upon the question, that if a transfer of the claim had been made, whether it was made in good faith, or fraudulently, and for the purpose of cheating and defrauding the creditors of Allis, and especially the Throop Company.

The court ruled against the plaintiffs upon each and all the said propositions and granted the defendant's motion for a non-suit.

To which rulings and decisions the plaintiffs excepted.

And the case was thereupon directed to be heard in the first instance, at general term, upon case and exception.

This court granted a new trial at the October term, 1884 (*Throop agt. Smith*, 34 *Hun*, 91).

And at the January term, 1885, on application of the defendant, this reargument was granted on the authority of *Anthony agt. Wood* (96 *N. Y.*, 180).

Rollin Tracy, for plaintiffs.

I. The provisions of the Code of Civil Procedure constitute a complete system for the collection of debts by attachment (*secs.* 635, *sub.* 1, 636, *sub.* 2, 641, 644, 648, 649, *sub.* 3, 650, 654, 655, 677, 678).

The claims involved were of the character contemplated by and the proceedings had were in exact conformity to the requirements of these provisions of the Code (*Bills agt. Nat. Park Bank*, 89 *N. Y.*, 343; *Gibson agt. Nat. Park Bank*, 98 *id.*, 87; *Bowie, sheriff, agt. Arnold*, 31 *Hun*, 256; *Hall agt. Brooks*, 23 *id.*, 577; *Anthony agt. Wood*, 29 *id.*, 239; *Green agt. Stern*, 1 *City Ct.*, 460; *Kelly, sheriff, agt. Brensig*, 33 *Barb.*, 123; *Merchants and Traders' Bank agt. Dakin*, 50 *id.*, 587; *Lansing, sheriff, agt. Streeter*, 57 *id.*, 33).

II. There was no assignment or transfer of the claim at the time the attachment was levied, as matter of law.

If any indebtedness existed at the time from Allis to the

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Farrell Company it was a precedent debt. There was no new consideration nor anything parted with, or surrendered or cancelled, at the time.

And it has long been settled that no person can claim title, as *bona fide* holder, who receives a bill or note on account of a precedent debt (*Stalker* agt. *McDonald*, 6 *Hill*, 93; *Bank of Salina* agt. *Babcock*, 21 *Wend.*, 499; *Bank of Sandusky* agt. *Scoville*, 24 *id.*, 115; *Torley* agt. *Lee*, 12 *N. Y.*, 551, 555; *Van Heusen* agt. *Radcliff*, 17 *id.*, 580, 583; *Phoenix Ins. Co.* agt. *Church*, 81 *id.*, 218, 222).

III. There was no assignment or transfer of the claim at the time the attachment was levied, as matter of fact, and this question should have been submitted to the jury.

The transfer attempted to be made was by means of the two drafts. All the letters were written after the drafts were made, except one, and were incident to the transfer.

No previous arrangement was made with the Farrell Company for any transfer.

The attachment debtor sent the drafts to the Farrell Company for collection, and requested them to give credit for the same on their books. This was not done, and on the 19th day of December, seven months after, had not been done. Two drafts were made, one for \$1,050, and one for \$2,800, because the machinery had not all been delivered, the smaller draft representing the machinery delivered, Allis stated would be paid by Smith at once, but the other he would not pay until he received the balance of the property. The drafts were forwarded by the Farrell Company for collection, with instructions to the bank to which they were forwarded to hold the larger draft and not present it until the balance of the machinery was received by Smith. This course was pursued. Smith on receiving notice of the drafts from Allis refused to accept or pay them until he had received all the machinery, and a claim of Rathbun's for \$385 he had paid was deducted, and he was indemnified against the attachment proceedings and the replevin suit brought at the request of Allis. This reduction being made and indemnity

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given, Smith, on the 10th day of September, and after this action was commenced, paid the \$3,465, the balance of the claim. The balance of the machinery represented by the larger draft was not shipped by the Farrell Company, or received by Smith, until after the attachment was levied upon the claim, over four months before Smith paid the claim. Up to the time the claim was paid, no arrangement had been made between Allis and the Farrell Company as to how the money should be disposed of by the Farrell Company. They then corresponded on that subject, but so far as the record shows no agreement has yet been made for its disposition, and the Farrell Company hold it as collection agents, for and subject to the directions of Allis and as his money.

It takes, in this case, three to make a bargain, and since there was no acceptance or application of the drafts by the Farrell Company in the manner directed by Allis when he sent the drafts, and Smith did not accept them until after the levy of the attachment, the claim was secured under that levy, unaffected by this pretended transfer. This must certainly be the case as to the position of the claim covered by the larger draft (*Bills agt. Nat'l Park Bank*, 89 N. Y., 343; *Gibson agt. Nat'l Park Bank*, 98 id., 87; *Sidenbach agt. Riley*, 2 How. [N. S.], 143; *Blaut agt. Gabler*, 77 N. Y., 461; *Juilliard agt. Chaffee*, 92 id., 537; *Powell agt. Powell*, 71 id., 71.)

The Farrell Company could only enforce collection from Smith by virtue of his acceptance, and, therefore, both the consideration of the drafts, as between Allis and the Farrell Company, and the condition and extent of their acceptance, or whether he accepted at all, were proper and material subjects of inquiry and submission to the jury (*Brill agt. Tuttle*, 81 N. Y., 454; *Ehrics agt. De Mill*, 75 id., 320; *Risley agt. Smith*, 64 id., 576; *Gallager agt. Nichols*, 61 id., 435; *Munger agt. Shannon*, id., 251; *Shaver agt. The Western Union Tel. Co.*, 57 id., 459).

Besides these drafts could not effect a transfer of the claim, as they were in the usual form, and were not by their terms

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drawn on any specific fund or demand (*Attorney-General agt. The Continental Life Ins. Co.*, 71 N. Y., 325).

The question should have been submitted to the jury, whether, if a transfer of the claim had been made, it was made in good faith or fraudulently, and for the purpose of defrauding the plaintiff in the attachment (*Lansing, Sheriff, agt. Streeter*, 57 Barb., 33; *The Merchants' and Traders' Bank agt. Dakin*, 50 id., 587; *Anthony agt. Wood*, 29 Hun, 239; *Klinck agt. Kelley, Sheriff*, 63 Barb., 622; *Rinchey agt. Stryker*, 28 N. Y., 45).

In *Thurber agt. Blank* (50 N. Y., 80), and *Castle agt. Lewis* (78 N. Y., 131), upon which the decision in *Anthony agt. Wood* (96 N. Y., 180), was based, the question of fraudulent transfers was not involved.

Bills agt. National Park Bank (89 N. Y., 343), was an action not unlike this, and the court very pertinently remarks: "If claims can be attached only by service of the attachment upon the attachment debtor, and the actual seizure of the claim while he holds them, then a fraudulent debtor may easily place his creditors at defiance by concealing himself, or absenting himself, from the state, and though his debtors remain within the jurisdiction of the court, the debts cannot be attached; or he may, after the attachment has been served upon his debtor, make a fraudulent, sham or merely formal transfer, and thus defeat the attachment. Such has not been generally understood to be the law of the state, and is not now the law."

This case was again before the court of appeals (*Gibson agt. National Park Bank*, 98 N. Y., 87), where the former decision (89 N. Y., 343), was reaffirmed, and the case of *Anthony agt. Wood* applied.

This bank case clearly sustains the position that this claim was properly attached in the hands of Smith, as it was levied before he accepted or paid the drafts, or the amount to be paid was agreed upon or fixed, or the property constituting the consideration of the claim was received, or any arrangement was made for the application or disposition of the money, and after this action was commenced (*Anderson agt. Hun*, 5 Hun, 351;

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Raymond agt. *Richmond*, 78 N. Y., 351; *Turrie's Case*, 1 *Smith's L. C.*, 1, and notes).

But the defendant has himself presented this issue of fraud.

The answer sets up as new matter the transfer, and alleges that it was made in good faith and for a valuable consideration. The issue thus presented, the defendant was bound to sustain by evidence (see *Gibson* agt. *National Park Bank*, 98 N. Y., 87), and proofs were given by him to sustain this issue, and the plaintiffs were, therefore, entitled to meet such proofs and to have the question submitted to the jury on the evidence *pro* and *con*.

Besides, to this issue no reply is required, and it is to be deemed controverted, and the plaintiffs are entitled to traverse or avoid it by proofs on their part (*Code Civil Pro.*, sec. 522).

If, under all the facts, this action can be defeated, then the attachment creditor is utterly remediless under the laws of this state, to which he has a right to seek a remedy. The attachment debtor and his alleged assignee are both non-residents of and without property in this state and the law provides no mode under which jurisdiction can be obtained against them whereby proceedings to set aside the alleged assignments can be taken or enforced. Both the attachment debtor and his alleged assignee have furnished ample and available indemnity to this defendant to secure him against any recovery that may be had against him in this action, and the action should be sustained, for the facts appearing in the proofs establish a fraudulent transfer of this claim beyond any question, under the rules of law too well known to require a reference. And the assignees, although possessed with full knowledge of all the facts surrounding these transactions, have not seen fit to ask to be impleaded, and submit themselves to the jurisdiction of this court, as they could and should, had they any rights to protect (*Code Civil Pro.*, sec. 820; *Steuben County Bank* agt. *Alberger*, 56 *How.*, 345; *Bills* agt. *National Park Bank*, 89 N. Y., 343; *Johnston* agt. *Stimmel*, *id.*, 117; *B. and O. R. R. Co.* agt. *Arthur*, 90 *id.*, 243).

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And it is submitted upon the whole case, that the former decision (34 *Hun*, 91) should be reaffirmed and a new trial granted, with costs to abide event.

Waters, McLennan & Dillaye, for defendant.

I. The plaintiffs right of action depended solely upon the title acquired by the sheriff, by virtue of his levy of an attachment, issued in an action wherein the plaintiff's company were plaintiffs and Edward P. Allis was defendant. The levy was made on the 21st day of May, 1881, upon the chose in action described in the pleadings.

II. Upon the day of the levy, or rather the attempted levy, the defendant, Smith, did not owe the defendant in the attachment action the claim in suit, as it had been transferred before the levy of the attachment.

III. The transfer operated as an equitable transfer of the claim to the Farrell Foundry and Machine Company, of Ansonia, Connecticut, from the delivery of the draft and letters dated May 10, 1881, to wit, May 13th, and from that date the Farrell Foundry and Machine Company had a perfect right of action to recover said debt of Smith (*Brill et al.* agt. *Tuttle*, 81 *N. Y.*, 454; *Lewis* agt. *Berry*, 64 *Barb.*, 593; *Parker* agt. *City of Syracuse*, 31 *N. Y.*, 376; *Risley* agt. *The Phoenix Bank, &c.*, 83 *id.*, 318; *People ex rel.* agt. *Controller*, 77 *id.*, 45).

IV. The creditor can maintain no action under the attachment which could not be maintained by the defendant in the attachment suit (*Thurber* agt. *Blank*, 50 *N. Y.*, 80, 86). And neither the creditor in the attachment suit nor the sheriff can either maintain an action or defend one, upon the ground that the chose in action was fraudulently transferred (*Castle* agt. *Lewis*, 78 *N. Y.*, 131, 137; *Anthony* agt. *Wood*, 96 *id.*, 180). The motion for a new trial should be denied, with costs.

BARKER, J.—If Allis & Co. sold and transferred the debt in suit to the Farrell Company before the attachment was levied

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thereon, then this action cannot be maintained, although such sale was void in law as against the attaching creditor. We all concur in this proposition, on the authority of *Anthony agt. Wood* (96 N. Y., 180), *Pinchey agt. Striker* (28 id., 45).

The attachment could become a lien only upon such choses in action as belonged to the debtor at the time of the levy. Whether or not there was such a transfer of the title to the demand in question as the defendant now sets up was a mixed question of fact and law.

The sheriff sought to make a levy on the 21st of May, 1881, by leaving a proper notice with the defendant Allis & Co., being non-residents. Up to this time all the negotiations relating to a sale and transfer had been carried on by correspondence between Allis & Co. and the Farrell Company. From their letters and the attending circumstances, the fact in issue is to be determined. It may be conceded that Allis & Co. were desirous to divest themselves of all title to their demand against the defendant, with a view of placing it beyond the reach of the attachment proceedings. But this they could not accomplish without the assent of the Farrell Company to become a purchaser and to take the title.

On this question, in my judgment, the evidence is not conclusive, and the case should have been submitted to the jury for their determination. The acts of Allis & Co., standing alone, could not affect a transfer. They never executed any paper which in form constituted a sale and assignment of the debt to the Farrell Company. The negotiations relative to the sale were commenced by Allis & Co., and at most was a proposition on their part to sell and transfer the debt to the Farrell Company. Therefore, at the time of the levy, the title was still in Allis & Co., unless prior to that their proposition had been accepted by the Farrell Company, and became the purchaser and assignee of the demand.

In terms, the latter company never consented to purchase the demand and take the title thereto. Neither did they do any act on their part which the court can say as a matter of

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law was an agreement to purchase the demand against the defendant Smith. In their first letter, under date of May 10th, inclosing the two drafts, Allis & Co. made the request of the Farrell Company to credit their account with the amount of the drafts. In a reply written three days thereafter, the Farrell Company acknowledged the receipt of the drafts and stated that they had been forwarded "for collection," and that they "will report when drafts are paid." The letter of Allis & Co. does not intimate a desire to sell the debt against which the drafts were drawn. In the usual and ordinary course of business between merchants and traders, the drafts would be regarded as sent for collection, and as a means, when paid by the drawee, of placing funds in the hands of the payee for the purposes indicated in the letter of instruction.

It also appears that on the same day their first letter was dated, Allis & Co. sent another letter to the Farrell Company relative to the drafts which were inclosed in the first, in which they say: "Our people to-day send drafts on Smith for amount due from him. We charge the amount to you in general account, and want you to credit the same and collect it. Please have no error in receiving and treating the drafts as belonging to you." It does not clearly appear from the evidence that this letter had been received by the Farrell Company when they sent their letter of the 13th, to which reference has been made. If it was in hand at that time, the fact that in their reply they wholly omitted to refer to the contents of the last letter written by Allis & Co., has much significance as indicating that they did not assent to the proposition to treat the drafts as their own, and this is the more so when considered in connection with the fact that they never did credit Allis & Co. with the drafts, and the evidence tends to show that they did not treat them as their own until the drawee had accepted and paid the same, which was after the levy made by the sheriff. If in fact the last letter was received by the Farrell Company, after they had sent the one under the date of the 13th of May, then the same significance may be given to their omission to

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acknowledge its receipt, or reply to the same in any manner until after the attachment was served. It was for the jury to say whether the omission on the part of the Farrell Company to reply to the letter amounted to an assent upon their part to accept the proposition of Allis & Co. to become the purchaser of the debt against the defendant Smith. The letter of the 19th of May, written by the Farrell Company to the defendant, in which they stated that they have credited Allis & Co. with the drafts, and that they were the owners of the same, is not conclusive evidence in the face of the other circumstances, that they had assented to become purchasers before the levy of the attachment. It was not addressed to Allis & Co., and whether it was received by Smith before the attachment was levied, does not appear. As a matter of fact, the account of Allis & Co. had not been credited with the amount of the drafts. As against the evidence on which the defendant relies for the purpose of showing title in the Farrell Company, at the time of the levy, there are many facts and circumstances which would have justified the jury in reaching the conclusion that the latter never assented to the proposed sale and did not become a purchaser of the claim prior to the levy. The defendant Smith was not a debtor to Allis & Co. at the time the drafts were drawn and forwarded to the Farrell Company. The contract to supply machinery was then unexecuted in part, and the defendant was under no obligation to make any payment until it was fully performed, and he assumed that position on refusing to accept the drafts. There is another circumstance indicating that Allis & Co. did not regard that they had surrendered all control over the contract with the defendant, for as late as the 17th of May they agreed with Smith to abate from the contract the sum of \$385, against which their draft was drawn. After the levy was made, and in a letter dated May 30th, the Farrell Company assent to that arrangement.

There is also evidence which, I think, tends to show that after the levy was made, and before the defendant paid the

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drafts, Allis & Co. gave their notes to the Farrell Company for balances found due from them without deducting therefrom, or claiming the right to do so, the amount of the drafts, and thus indicating that it was not the intention of the Farrell Company to treat the drafts as so much paid on their account against Allis & Co.

If the Farrell Company consented to accept the proposition made to them by Allis & Co. to purchase the drafts, and the minds of the parties met on the terms of the bargain, and the drafts were sent and delivered to the payee, as a mode of effecting the transfer, the title, doubtless, did pass as between those parties, although the drawee refused to accept the same. But sending forward of the drafts alone, without any further arrangement between the parties relative to a bargain and sale of the debt, would not be sufficient to transfer either the legal or equitable title thereto.

A check or inland bill of exchange, drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount, standing to the credit of the drawer, does not operate as an assignment, either actual or equitable, of the funds of the drawer in the hands of the drawee. Such check or draft to have the effect of an equitable assignment must be drawn on a particular specified fund (*Attorney-General agt. The Continental Life Ins. Co.*, 71 N. Y., 325).

At the time these drafts were drawn, and until after the levy was made, Smith was not a debtor to the drawer in any sum whatever, for the contract between him and Allis & Co. was unexecuted in part, and in a legal sense he was not indebted to the drawer, nor were there any funds in his hands belonging to Allis & Co.

A *chose in action* may be assigned by parol, yet, to constitute such an assignment, there must be a surrender of all control over the demand by the creditor, and it must be shown that the appropriation of it was absolute and unqualified. If the case had been submitted to the jury, and they had found, as I think

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they would have been justified in finding, from the evidence that at the time the drafts were sent forward the Farrell Company parted with no value on receiving the same and did not relinquish any right which they had against Allis & Co., then there was no transfer of the demand, nor an equitable assignment of the same (*Rupp* agt. *Blackford*, 34 *Barb.*, 629; *Kissell* agt. *Albertus*, 56 *id.*, 365).

The general rule is, as established by all the authorities, that an ordinary draft, unaccepted, does not work a transfer to the payee of the debt drawn against. What will amount to the present appropriation of the debt or demand so as to constitute a legal or equitable assignment, where there is no formal transfer, is a question of intention, to be gathered from all the language used by the parties, written or verbal, construed in the light of the surrounding circumstances.

If there was a failure to make an actual transfer of the debt *in presenti*, then the Farrell Company was not bound by any contract valid as against it, for the reason that none of its officers or agents subscribed any note or memorandum in writing agreeing to purchase the debt. The statute of frauds applies to a sale of a thing in action, when the contract price is fifty dollars or more. An account for goods sold and delivered is a *chose in action* (*Armstrong* agt. *Cushing*, 43 *Barb.*, 340).

As we have seen, the draft standing alone did not operate as a transfer even in form, so the court could not say as a matter of law that the buyer did accept and receive the thing in action, or some evidence of it, so as to satisfy the second subdivision of third section of the statute. Nor did the Farrell Company pay any part of the purchase price. An agreement that the price shall be applied to a precedent debt, owing by the seller to the buyer, does not amount to a payment of the purchase money as required by the statute, unless actually applied by giving a receipt or otherwise (*Ely* agt. *Ormsby*, 12 *Barb.*, 570).

It is not well settled how much must be done to make an effectual assignment of an account. But it was said by the court in *Truax* agt. *Stater* (86 *N. Y.*, 630): "The better opinion

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seems to be that an account may be sold like any chattel, and that an agreement which will pass the title to a chattel will pass the title to an account. There must be a valid agreement of sale, based upon a sufficient consideration, and if the price be fifty dollars or over the statute of frauds must be complied with."

If, at the time of the levy, the Farrell Company had assumed the position as against Allis & Co., that it was not bound by any valid contract to allow the face of the drafts on its account against them the court could not hold, as I think, in a suit between those parties involving the validity of the sale, that as a matter of law the title to the account had in form passed to the Farrell Company, and Allis & Co. were entitled to a credit on their account for the face of the drafts.

Upon the whole evidence, I think a case was made for the jury. Some of the facts essential to resting a title to the account in the Farrell Company, even as against Allis & Co., were not so clearly settled by the evidence, that the court could dispose of the case as matter of law.

Nonsuit set aside. New trial ordered. Costs to abide event.

SMITH, P. J., concurs; BRADLEY, J., dissents and reads an opinion for affirmance; HAIGHT, J., does not vote.

BRADLEY, J. (*dissenting*).—The defendant had made a contract with Allis & Co. for the purchase of some flouring mill apparatus to be sent by railroad to him at Marcellus, N. Y. A portion of this was manufactured by Allis & Co., at Milwaukee, some at Jackson, Mich., and some by the Farrell Foundry and Machine Company, of Ansonia, Conn. The portions from the two former places were shipped to the defendant in April, and that from Ansonia in May, 1881. And it all amounted to \$3,850. By the contract, the title to the property was vested in the defendant when loaded on the cars and consigned to him, and therefore the levy of the attachment on the property was ineffectual (29 *Hun*, 493). This action is in aid of the attachment (*Code Civil Pro.*, sec. 677). And the important

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question is, where was the legal title to the claim against the defendant for the property so contracted to be sold, and sold by Allis & Co. to him at the time of the levy of the attachment, on the 21st day of May, 1881? On the part of the defendant, it is contended that it was not then in Allis, but by transfer from Allis & Co. the Farrell Foundry Machinery Company had taken such title. While the contention of the plaintiffs is, that no effectual transfer had been made to the latter company, and that the attempted transfer was fraudulent and void as against the plaintiffs, the Throop, &c., Company, a creditor of Allis.

The plaintiffs' right to maintain this action is dependent wholly upon the creation of a specific lien by the levy of the attachment, and that was not accomplished unless the legal title was then in Allis to the claim against the defendant. If a transfer had been in fact made of it to the Farrell, &c., Company, the attachment levy was not effectual to furnish any lien or right of the action. The question whether or not the transfer was fraudulent as against the creditors of Allis cannot arise, nor is it entitled to consideration in this action (*Anthony agt. Wood*, 96 N. Y., 180; *Lawrence agt. Bank of the Republic*, 35 *id.*, 320.)

It seems that the attachment had been levied May 7th upon the machinery which had arrived at Marcellus, and on the 9th of May the defendant advised Allis & Co. by telegram of the levy; and on May 10th that company sent to the Farrell, &c., Company two sight drafts on the defendant, one for \$1,050 and the other for \$2,800, and by letter wrote the company that the drafts had been sent and requesting credit for them; and by another letter of the same date to the company say: "Our people to-day send drafts on Smith for amount due from him. We charge the amount to you in general account, and want you to credit the same and collect it. Please have no error in receiving and treating the drafts as belonging to you." And by letter of the same date Allis & Co. say to the defendant: "We have to-day assigned our account against you to the Far-

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rell Foundry and Machine Company, of Ansonia, Conn. You will kindly honor their drafts when presented." Farrell & Co., by letter of May 13, acknowledge receipt of that to them of the 10th, and say to Allis & Co.: "We have sent the two drafts on H. C. Smith forward for collection. * * * Will report when the drafts are paid." And May 19th the Farrell Company wrote the defendant: "We have credited the drafts on his Allis & Co.) account, they became ours, * * * and we would like New York drafts for the amount, as you and he agree." And evidence was given tending to prove that Allis & Co. charged the amount of the claim to the Farrell Company when the drafts were sent to them, and that the latter company made an entry of the drafts on their bill book, but did not place them to the credit of Allis & Co. by any entry in their account with them. That at the time the drafts were sent to, and the request made of the Farrell Company to credit the amount, the indebtedness of Allis & Co. to that company exceeded the amount of those drafts.

The evidence was sufficient as between those parties to support a transfer of the claim against the defendant to the Farrell Company. It is, however, contended by the learned counsel for the plaintiffs that such fact was not conclusively established, but that the evidence, at most, presented a question of fact for the jury which should have been submitted to them. The transaction rested wholly in written communications.

The drafts were sent with information that the amount was charged in account and with request of the Farrell Company to so credit them.

The latter company received the drafts and advised Allis & Co. that they had sent them forward for collection, and informed the defendant that they had given Allis & Co. credit for them. This, as between the parties, would seem to take from the latter the right to collect the claim and vest it in the Farrell Company. The fact that the drafts were sent forward by it on the receipt of them, with information to Allis & Co. that they were so used, was an effectual adoption of the ex-

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pressed purpose for which they were sent to and received by them. The two drafts correspond in amount with that of the amount of the defendant's liability upon his contract for the supply of machinery, and there was then *no other* existing dealing or transaction between him and Allis & Co. Those drafts were understood to be, as they were in fact, drawn on account of such liability or debt, which in some states would give to the drafts, as between the drawer and payee, the effect of an equitable assignment of the claim (*Daniel on Neg. Insts.*, *secs.* 17-28; *Mandeville agt. Welch*, 5 *Wheat*, 277; *Roberts agt. Austin*, 26 *Iowa*, 815; *Forgaities agt. Bank*, 12 *Rich*, 518; *Mann agt. Buck*, 25 *Ill.*, 35).

In this state, the rule is such that the mere drawing and transmission of the drafts by the drawer to the payee would not have the effect of an assignment of the fund or debt due from the defendant, as the drafts were not in their terms drawn upon the particular fund, but were in form negotiable bills of exchange, and the acceptance by the defendant was requisite to effect an assignment of the debt or of his liability to pay it (*Attorney-General agt. Continental Life Ins. Co.*, 71 *N. Y.*, 325; *S. C.*, 27 *Am. Rep.*, 55). But here the defense does not rest alone upon the effect of the drawing and receiving the drafts. The intention and purpose of transfer are expressed in the correspondence, and is necessarily by it so understood by all the parties to the transaction.

The delay in acceptance by the defendant was not caused by any misunderstanding or want of acquiescence in that respect, but to obtain indemnity against the proceedings taken by the Throop, &c., Company to charge the defendant with liability to it for the amount of the debt. The reason which induced the transfer does not defeat its operation as such between the parties, but goes only to the good faith of the transaction. It is evident from the correspondence that the reason and one purpose of the transfer was to defeat the right of the Throop, &c., Company to obtain a lien upon the claim by attachment or to appropriate it to the payment of the judgment, that the com-

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pany might recover in its action against Allis. But there is not sufficient in this and the circumstances as between Allis & Co. and the Farrell Company to so qualify the transaction as one for collection of the debt simply as distinguished from and in exclusion of a transfer. While the former result was in view, the right of the Farrell Company to the fund was given by the transfer, and could not be diverted by Allis & Co., although as against a creditor of the latter permitted to allege fraud as against their creditors the transfer would be treated as void. The fact that the entire amount of the drafts had not become due at the time they were drawn is not important, as the liability to pay was in a then existing contract for the purchase of property a portion of which had then been delivered. The residue was to go from the Farrell Company and was delivered before the levy of the attachment.

The transfer covered the debt arising out of the liability of the defendant given by such contract; and when the Farrell Company sent forward the drafts for collection they advised the defendant that the rest of the property would be delivered the then next week and requested him to have the bank hold the larger draft until the arrival of such residue of the property.

In *Bills* agt. *National Park Bank* (89 N. Y., 343), and *Gibson* agt. *Same* (98 *id.*, 87), the fund in question belonged to the corporation debtor at the time the attachments were levied and the outstanding certified checks drawn upon it were then held by its officer for its purposes, and did not go into the hands of a *bona fide* holder, but were paid to such officer by transfer to his individual credit and the fund used for the benefit of such debtor. The lien of the attachment was held effectual to support the actions against the bank because it was chargeable with notice of the relation of the officer. The checks were drawn by and payable to him as such.

The cases cited by the plaintiffs' counsel relating to the effect of the levy of an attachment upon tangible property, capable of manual delivery, which had been transferred in fraud of creditors, do not necessarily have any application to the case at bar.

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In such case the lien of attachment will support an action in aid of it, and of the execution issued upon the judgment recovered in the action, and the plaintiff may attack the transfer as fraudulent against the creditors of the debtor (*Rinchey* agt. *Stryker*, 28 *N. Y.*, 45; *Frost* agt. *Mott*, 34 *id.*, 253). But no such lien is acquired upon choses in action, not the subject of levy by execution, as against a fraudulent assignment.

The question of good faith of the assignment, or fraud as against creditors, cannot arise in an action by the attaching creditor in support of the lien of his attachment.

The remedy for relief in such case is in equity only by action in the nature of a creditor's bill (*Thurber* agt. *Blanck*, 50 *N. Y.*, 80; *Anthony* agt. *Wood*, *supra*).

The view taken of the case leads to the conclusion that there was no evidence to support a verdict for the plaintiffs; and that the motion for a new trial should therefore be denied, and judgment directed for the defendants.

NEW YORK COMMON PLEAS.

In the Matter of the General Assignment of ROBERT C. WATSON
et al. to CHARLES D. WELLS.

In re Petition of THE UNION MANUFACTURING COMPANY OF
MARYLAND.

Assignment—By commission merchants, does not carry to assignee the proceeds of sales made strictly on commission nor amounts due from purchasers of goods sold by consignees—Such proceeds however, whether paid over before the assignment is made or due from purchasers, will not be ordered paid to the consignors of the goods sold till the court is satisfied that moneys can be so paid without prejudice to the rights of preferred and general creditors of the assignors—To that end, a reference will be ordered, on application, to ascertain the facts with a view of directing payment to the consignors—Petition for order directing payment to consignors direct—Order of reference—Facts essential for information of the court on such application made by consignors—Notice, to whom given.

Where a general assignment was made by W. & B., commission merchants,

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to one W., and it appeared by the petition of The U. M. Co. of Md., that the petitioner had for several years been shipping its goods to the assignors to be sold strictly on commission, the assignors having no interest in the goods sold nor in the proceeds thereof, except such commission as was agreed upon; and at the time of the assignment by W. & B. they held moneys collected for The U. M. Co. of Md., which they turned over to the assignee, W., and that there were other moneys due from persons to whom sales had been made by W. & B. before their assignment; the consignors of the goods applied *ex parte* (i. e., notifying the assignee only and not the creditors), to the court by petition, on the facts stated, for an order directing the assignee of W. & B. to pay over the collected moneys, and, also, that the uncollected moneys be paid directly to the consignor of the goods:

Held, that on the facts stated an *ex parte* order should not be granted for the payment of the moneys to the consignors.

Held, further, that the general creditors are entitled to a hearing and to inquire into the facts respecting the assignment, its items and the agreement as to the disposition of the proceeds; that an order of reference to inquire into the facts and provide that all creditors whose names appear on the assignee's books be at liberty to appear and contest the right of the consignors to follow the proceeds of the goods sold by the assignors.

Where the facts on the report of the referee satisfy the court of the correctness of the allegations in the petition, and it appears that the sales made by the consignees were strictly on commission, the proceeds, less commissions, belonging to the consignor under the agreement between the commission merchants and the manufacturers, will be directed to be turned over to the petitioner by the assignee and purchasers of the goods in question. [See note at end of case.]

Special Term, December, 1885.

MOTION on behalf of The Union Manufacturing Company of Maryland to compel Charles D. Wells, assignee of Watson & Bartholow, to pay over certain moneys and to assign other claims.

The Union Manufacturing Company of Maryland, a manufacturing corporation organized under the laws of the state of Maryland, consigned its goods for many years prior to November 9, 1885, to Watson & Bartholow, commission merchants of the city of New York.

In November of that year, Watson & Bartholow made a general assignment with preferences for the benefit of their credit-

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ors. Charles D. Wells was their assignee. At the time of the assignment The Union Manufacturing Company of Maryland claimed that certain goods previously consigned to Watson & Bartholow were consigned under a specific agreement between the parties that the consignees had not and were not to have any interest in the proceeds of such sales, except only commissions.

Application was made by petition, on behalf of The Union Manufacturing Company, to his honor judge VAN HOESEN, sitting at chambers, for an order directing payment by the assignee of moneys the proceeds of alleged sales by the assignors; also, that moneys which had never been paid to the assignors, but shown due by their books for consigned goods be paid by the purchasers directly to the petitioner and that the assignee assign such claims to the petitioner. No notice was given to any of the creditors of this application; but the assignee had notice.

Chauncey B. Ripley, for petitioner.

W. J. Osborne, for assignee.

VAN HOESEN, *J.*—On these papers I cannot make an *ex parte* order for the payment of these moneys to the consignors represented by Mr. Ripley. The general creditors are entitled to a hearing and to inquire into the facts respecting the assignment, its items and the agreement as to the disposition of the proceeds. It would never answer to allow the estate of every commission merchant to be absorbed by the consignors of goods, without giving general creditors an opportunity to be heard. I will make an order of reference to inquire into the facts, and provide that all creditors whose names appear on the assignee's books be at liberty to appear and contest the right of the consignors to follow the proceeds of the goods sold by the assignors.

NOTE.—After the foregoing opinion was filed an order was made and entered by the same judge (VAN HOESEN) directing that it be referred to John Whalen, Esq., "to inquire into the facts respecting the matters set

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forth in the petition regarding the claims of the petitioner, The Union Manufacturing Company of Maryland, for the information of the court, and report all facts necessary to enable the court to determine whether, with equal justice to all other creditors, the petitioner is entitled at once to the several amounts he claims in his petition; allowing all the creditors of the estate to appear and contest the claims; and that notice of the hearing be given to the preferred creditors and to at least ten of the unpreferred creditors whose names appear on the assignee's books. Five days' notice in writing, to be given to such creditors and the underwriting of the referee fully and clearly to state the nature of the petitioner's application, the object of the reference; the creditors to be at liberty to appear and contest."

The referee reported in favor of granting the petition. His report was subsequently (5th March, 1886) confirmed by ALLEN, J.—[Ed.]

CITY COURT OF NEW YORK.

FREDERICK S. MYERS agt. WILLIAM E. UPTEGROVE *et al.*

Common law lien—How acquired on personal property—When not lost by taking promissory note—Delivery of part of the property does not defeat the lien.

Any person, who by labor and skill imparts additional value to personal property, acquires a common law lien thereon which is not lost by taking the promissory note of the debtor, payable to their order, provided possession of the property be retained, and before demand therefor, the debtor becomes insolvent and the note is in consequence dishonored. Nor does the negotiation of the note divest the lien if the lien holder is obliged to provide for its payment.

The surrender of the note upon the trial is in such a case sufficient.

Where labor is done under one contract a delivery of part of the property does not defeat the lien upon the remainder for the entire consideration.

Trial Term, February, 1886.

TRIAL by the court without a jury.

The defendants sawed timber for Fitzpatrick & Co., lumber merchants, and their bill, aggregating \$761.09, became due in June, 1885. After pressing Fitzpatrick & Co. for payment, the

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defendants, on August 12, 1885, accepted Fitzpatrick & Co.'s note, payable in two months thereafter to the defendants' order. The defendants indorsed the note and had it discounted by the First National Bank of Middletown, N. Y. On the 26th of August, 1885, Fitzpatrick & Co., in consideration of a precedent debt, transferred the lumber to the plaintiff, who demanded it from the defendants on the 29th of September, 1885. The defendants refused to part with the lumber until their bill was first paid, whereupon the plaintiff brought the present action of claim and delivery to recover its possession. The defendants gave a counter bond and still retain possession of the property. The summons is dated September 30, 1885, and on the following day Fitzpatrick & Co. made a general assignment for the benefit of creditors to John Jeroloman, in whose place the present plaintiff was by order of the court subsequently substituted. Fitzpatrick & Co.'s note fell due October 15, 1885, and was protested for non-payment. The defendants, as indorsers, took it up and offered to surrender it at the trial.

Jeroloman & Arrowsmith, for plaintiff.

Rodman & Adams, for defendants.

MCADAM, *C. J.*—It is conceded that the defendants having, by their labor and skill, imparted additional value to the timber, acquired a common law lien, which gave them the right to detain the property till reimbursed for their expenditure and labor, and unless it has been lost by reason of the facts above detailed, the lien justified the defendants in refusing to deliver the property to the plaintiff without prepayment, and furnishes a complete defense to the action. The plaintiff merely succeeded to the title of Fitzpatrick & Co., and has no greater rights or equities than that firm would have had if the transfer by it to him had not been made; for, as was said in an analogous case by PARKER, J. (*Dixon agt. Yates*, 5 B. & Adol., 342

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343), "there was no delivery to the sub-vendee; and the rule is clear that a second vendee who neglects to take either actual or constructive possession is in the same situation as the first vendee under whom he claims. He gets the title defeasible on non-payment of the price by the first vendee."

The question which then arises is, whether the acceptance of Fitzpatrick & Co.'s note, payable at a future day, divested the lien?

There are cases holding that where a future time of payment is fixed the special agreement is inconsistent with the right of lien and destroys it (*Blake agt. Nicholson*, 3 *Maule & S.*, 168; *Chase agt. Witmore*, 5 *id.*, 306; *Crawford agt. Houfray*, 4 *B. & Ald.*, 50; *Burdick agt. Murray*, 3 *Vi.*, 302; *Trust agt. Pierson*, 1 *Hilt.*, 293; *Dunham agt. Pettee*, 1 *Daly*, 112; *Fieldings agt. Mills*, 2 *Bosw.*, 489).

The only future time of payment fixed in this case was that which the law implies from the acceptance of Fitzpatrick & Co.'s note, payable at a future day (the lien being in full force at the time of such acceptance), and this is subject to the qualification that if afterwards insolvency happens, and the bill is dishonored, the party exercises a right analogous to that of stoppage *in transitu*, which may be enforced by the vendor who has not parted with his property by retaining and refusing to deliver it (*Benjamin on Sales*, sec. 773); for a vendor may refuse to deliver goods wherever the right to stop them *in transitu* exists (*Craven agt. Ryder*, 6 *Taunt.*, 434; *Stiles agt. Howland*, 32 *N. Y.*, 309; *Cross agt. O'Donnell*, 44 *id.*, 665).

The case at bar is, therefore, analogous to that of a vendor who has sold goods and not parted with possession. In that event the vendor has a common law lien for the price, and if he has sold on credit he has not destroyed his lien, but waived it upon the implied condition that the vendee shall keep his credit good, and if, pending the term of credit, the vendee becomes insolvent, and the goods remain in the actual possession of the vendor, the vendor's lien revives, even though the title and right of possession may have passed to the vendee (*Ham-*

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burger agt. Rodman, 9 *Daly*, 93). I find, as matter of fact, that Fitzpatrick & Co. were insolvent at the time they gave their note, and that such insolvency continued up to the time of trial. Under such circumstances, the note which they gave to the defendants did not pay the pre-existing debt represented by their lien (*Noel agt. Murray*, 13 *N. Y.*, 167; *Gibson agt. Tohey*, 46 *id.*, 640; *Ward agt. Evans*, 2 *Lord Raym.*, 930; *Wehrlin agt. Schwartz*, 1 *City Ct.*, 101).

In *Roberts agt. Fisher* (43 *N. Y.*, 159), the court said: "Upon broad principles of justice, it would seem that a man should not be allowed to pay a debt with worthless paper, though both persons supposed it to be good." On this principle, payment in bills of an insolvent bank, supposed to be good, is not a satisfaction of the debt (*Ontario Bank agt. Lightbody*, 13 *Wend.*, 101; *Thomas agt. Todd*, 6 *Hill*, 340).

A promissory note is merely a promise to pay, and where a debt is conceded to be owing, it should not be regarded in law or in morals as paid by a broken promise, unless prevailing equities are so strong that substantial justice requires a departure from sound principles of legal policy.

The defendants never relinquished possession of the property on which they bestowed their labor, and have always maintained and asserted their right of lien, which has not been extinguished by the unperformed promise of their debtors.

The defendants, as indorsers, were obliged to take up the dishonored note, and its surrender at the trial, under the circumstances, was timely (*Nichols agt. Michael*, 23 *N. Y.*, 272, 273; *King agt. Fitch*, 1 *Keyes*, 450).

The logs were sawed under one contract, though on different days, and the lien for compensation extended to every portion of them. The delivery of part did not defeat the lien upon the remainder for the entire contract price (*Morgan agt. Congdon*, 4 *N. Y.*, 552; *Story on Contracts*, secs. 742, 797; *Schmidt agt. Blood*, 9 *Wend.*, 268; *Buckley agt. Furniss*, 17 *id.*, 504; *Partridge agt. Dartmouth College*, 5 *N. H.*, 286; *Benjamin on Sales*, sec. 806).

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The equities are all with the defendants, and upon the entire case I find in their favor.

Judgment accordingly, with costs.

SUPREME COURT.

HORACE WEBSTER and another agt. WILLIS SAWENS and another.

Supplementary proceedings—Sufficiency of the affidavit to warrant the order to appear and answer.

Where the affidavit upon which an order for a debtor to appear and be examined in supplementary proceedings was entitled in the supreme court, giving the title to the action and stating that "judgment was rendered and perfected in this action," &c.:

Held, that this is in substance a statement that judgment was recovered in the supreme court.

The affidavit stated that the said judgment was docketed and the judgment roll filed in the office of the clerk of the county of New York on the 14th day of January, 1886, and a transcript filed and duly docketed in the office of the clerk of Oneida county on the 15th day of January, 1886, and that an execution against the property of the defendants was on that 15th day of January, 1886, duly issued on said judgment and delivered to the sheriff of Oneida county, where the defendants reside.

Held, that upon this state of the case it will be presumed as between the parties, that the execution was issued after the filing of the transcript.

Held, further, that there being a sufficient allegation of the recovery of the judgment in the supreme court, then the allegation that the execution was duly issued on said judgment is in substance an allegation that the execution was issued out of a court of record.

Oneida Special Term, February, 1886.

MOTION by defendants to vacate supplementary proceedings by reason of defects in the affidavit upon which the order to appear and answer was made. The following is the affidavit:

COUNTY OF ONEIDA, ss.:

William Townsend, being sworn, says, that he is the attorney

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for plaintiff and duly authorized to institute these proceedings; that judgment was rendered and perfected in this action in favor of Horace Webster and Charles W. Lawrence, plaintiffs, against Willis Sawens, Gilbert S. Sawens and Edwin S. Anderson (the latter not summoned), defendants, on the 14th day of January, 1886, for \$160.03 damages, and \$21.26 costs, upon the personal service of the summons upon defendants, Willis Sawens and Gilbert S. Sawens, and the said judgment was docketed, and the judgment roll therein filed in the office of the clerk of the county of New York on that day; that a transcript of the original docket of said judgment was filed, and said judgment duly docketed in the office of the clerk of the county of Oneida on the 15th day of January, 1886; that an execution against the property of the said Willis Sawens, Gilbert S. Sawens and Edwin S. Anderson was on the 15th day of January, 1886, duly issued upon said judgment, and delivered to the sheriff of the county of Oneida where the said defendants, Willis Sawens and Gilbert S. Sawens, then resided and yet reside and have a place for the regular transaction of business in person, directing said sheriff to levy upon the joint property of all the defendants and upon the separate property of the defendants served with summons, and that the said sheriff has duly returned the said execution wholly unsatisfied to the New York county clerk's office where the judgment roll in this action is filed; that such return was made within ten years; that the said judgment remains wholly unpaid and unsatisfied; that no previous application has been made for the order asked hereon.

WILLIAM TOWNSEND.

Subscribed and sworn to before me, }
this 16th day of January, 1886. }

JAMES A. LONG,
Notary Public, Oneida County, N. Y.

The grounds upon which motion is made to vacate is as follows:

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First. That the affidavit does not sufficiently describe the judgment, in that it does not show in what court the judgment was recovered.

Second. That the affidavit does not show that a transcript of the judgment was filed before the execution was issued and that it is not sufficient for them to state that the execution was issued the same day the transcript was filed.

Third. That the affidavit does not show that the execution was issued out of a court of record.

Fourth. It appears that the execution was issued on the 15th of January, 1886, and the order herein granted January 16th, and it does not appear that any sufficient effort was made to collect the debt by execution.

Fifth. That the order does not show before what judge further proceedings are to be had.

Sixth. The affidavit does not show in what county the judgment was recovered.

William A. Matteson, for motion.

William Townsend, opposed.

MERWIN, J.—It is claimed that the affidavit does not show in what court the judgment was recovered, or that a transcript was filed in Oneida county before the execution was issued, or that the execution was issued out of a court of record.

The affidavit is entitled in the supreme court, and gives the title of the action, and states that "judgment was rendered and perfected in this action," &c.

This is in substance a statement that judgment was recovered in the supreme court.

The affidavit states that the said judgment was docketed and the judgment roll filed in the office of the clerk of the county of New York on the 14th of January, 1886, and a transcript filed and duly docketed in the office of the clerk of Oneida county on the 15th of January, 1886, and that an execution against

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the property of the defendants was on that 15th of January, 1886, duly issued on said judgment and delivered to the sheriff of Oneida county, where the defendants reside. The filing of the transcript and issuing of the execution are on the same day, it not being stated that the execution was issued after the filing, except as it may be inferred from the expression "duly issued." Upon this state of the case, it will be presumed as between the parties, that the execution was issued after the filing of the transcript (*Jones agt. Porter*, 6 *How.*, 286; *Small agt. McCheyney*, 3 *Cow.*, 19).

There being a sufficient allegation of the recovery of the judgment in the supreme court, then the allegation that the execution was duly issued on said judgment is in substance an allegation that the execution was issued out of a court of record, according to the ruling in the case of *Jager agt. Shepard*, decided at Onondaga special term, September, 1885, and affirmed at general term, November, 1885.

It follows that the motion must be denied, with costs of motion.

SUPREME COURT.

JOHN HANKINSON agt. WILLIAM R. PAGE, as administrator, &c.

Executors and administrators—When court no jurisdiction over foreign administrator.

Where the defendant, who was a foreign administrator, was sued upon the guaranty of a bond, made by his intestate, and the complaint averred assets within the jurisdiction of this court, and an effort by the administrator to withdraw them from the state, and the relief prayed was a moneyed judgment, an injunction restraining defendant from receiving, taking possession of, or collecting such assets and for an accounting. On demurrer, alleging no jurisdiction in the court of either the person or subject of the action:

Held, that the demurrer was well taken, as this court has no jurisdiction of the person of the defendant as an administrator, because he was appointed in a foreign state

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Special Term, March, 1886.

Louis Sanders, for plaintiffs.

Alfred R. Page, for defendant.

BEACH, J.—The defendant is a foreign administrator, and sued upon the guaranty of a bond, made by the intestate.

He was appointed administrator by the probate court of Rutland, Vt. Action was commenced by the issuing of a summons to the sheriff, and by the subsequent appearance of the defendant. Attachment was levied upon debts due the estate.

The complaint avers assets within the jurisdiction of the court, and an effort by the administrator to withdraw them from the state. The relief prayed is a money judgment, an injunction restraining defendant from receiving, taking possession of, or collecting such assets, and for an accounting. The defendant demurs, alleging no jurisdiction in this court of either the person or subject of the action.

I think the demurrer well taken. This court has no jurisdiction of the person of defendant as an administrator, because he was appointed in a foreign state (*Story on Conflict of Laws*, sec. 513, and cases cited in note 3, page 657). The protection to the plaintiff and other creditors, given by law, is clearly stated in *Peterson agt. Chemical Bank* (32 N. Y., 21). "One of the most natural, as well as the most usual of these qualifications, is that which is intended to secure the creditors of the deceased residing in the county where the assets exist. It is in part to subserve this policy, that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts. But the protection to the creditor is further secured by the remedy which is provided by allowing them to take out administration in the jurisdiction where the assets are. If the deceased have any relatives in this state who would be preferably entitled, they can be summoned, and if they elect to take out letters themselves, they will be compelled to give bond, and the creditors will then be made secure in

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rights, or if the relatives refuse to assume that responsibility, then the creditors may themselves be appointed and thus qualified to take possession of the assets here upon the same terms."

The equity powers of the court have at times been exercised against foreign executors who have brought, or had in this state property of the testator. This has been done under proper averments and proofs, to prevent waste of assets and secure their application to the payment of debts according to the law of the state, where the executor derived his authority, so avoiding a total failure of justice. This is not an action in equity, but at law. Its character cannot be changed by praying an injunction and accounting.

Judgment for defendant on demurrer, with costs. Leave to amend in ten days on payment.

SUPREME COURT.

DARIUS M. BLISS agt. HAMILTON WALLIS and others.

Mortgage foreclosure—Allowance—Duress—Voluntary payment—When cannot be recovered back.

Upon the application of plaintiff, proceedings for the foreclosure of a mortgage were stayed, the plaintiff, although not a party to the mortgage, but liable on the bond, undertaking to pay the same by a certain day. Before the day named he procured a person to take an assignment of the mortgage. The defendants, the attorneys of the mortgagees, agreed to have the mortgage assigned, the plaintiff to pay the costs and expenses of the foreclosure suit. The defendants included in such costs and expenses an item of two and one-half per cent, amounting to \$137.50, in the nature of an allowance, which plaintiff disputed, and it was reduced by defendants to \$100, to which they claimed to be entitled, which latter sum was paid by the plaintiff, he, however, at the time protesting that it was illegally and wrongfully exacted. In an action brought to recover back the sum so paid:

Held, that it could not be recovered back, as paid under duress.

New York Circuit, April, 1885.

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UPON the application of the plaintiff, proceedings in an action for the foreclosure of a mortgage were stayed, the plaintiff, although not a party to the mortgage, but liable on the bond, undertaking to pay the same by a certain day.

Before the day named, however, he procured a person to take an assignment of the mortgage.

The defendants, the attorneys of the mortgagees, agreed to have the mortgage assigned, the plaintiff to pay the costs and expenses of the foreclosure suit.

The defendants, upon presenting their claim for the costs and expenses of the suit, included an item of two and one-half per cent on the amount due on the mortgage, in the nature of an allowance.

This item, amounting to \$137.50, was disputed by the plaintiff. It was reduced by the defendants to \$100, and to which they claimed to be entitled.

This sum of \$100 was paid by the plaintiff, he, however, at the time protesting that it was illegally and wrongfully exacted.

This action is brought to recover back the sum so paid.

Rufus L. Scott, for plaintiff.

Walter C. Gibson, for defendants.

VAN VORST, J.—It is not necessary to decide absolutely, whether the defendants were entitled to demand or receive from the plaintiff the sum of \$100 as an allowance in the foreclosure suit which was settled before judgment and after the summons had been served on one of the defendants only.

The plaintiff had agreed to pay the costs of the action. That would include any *legal* allowance contemplated by the statute.

The defendants, the attorneys for the plaintiff in the foreclosure suit, demanded in addition to the items of costs and charges, which were specially given, a further allowance of \$137.50.

This allowance they claimed under section 3253 of the Code.

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But that section of the Code leaves such further allowance to the discretion of the court.

The plaintiff offered to leave the question to the court. This the defendant refused, and insisted upon his right. In the end, however, they offered to take \$100, and it was paid by the plaintiff under protest.

The defendants declined to close the transaction, or give an assignment of the mortgage unless the costs and allowance were paid.

In order to get the assignment the plaintiff was obliged to pay the sum demanded.

There was no payment of money under any mistake of law or fact. Each party understood the transaction. A legal right was asserted by one party, and in the end, although under protest, acquiesced in by the other. Acquiesced in is, however, hardly the word. The plaintiff, while disputing the defendant's right to it, still paid the money.

Windbiel agt. *Carroll* (16 *Hun*, 101), seems to be a hard case. Thorne, the plaintiff, had assumed the payment of a mortgage. On a settlement with the mortgagees he claimed a credit of \$200, alleged to have been paid thereon by the mortgagor. The credit was refused. Plaintiff paid the sum in dispute, protesting that he would at once bring an action to recover it back, and he brought such action. On the trial a receipt was produced for a part of the sum claimed to have been paid.

The court said: "The plaintiff, therefore, when he paid the bond and mortgage, knew or believed that he was paying more than he was owing. The very fact on which he now seeks to recover was known to him and insisted upon by him at the time, and he made the payment with the intention of suing to recover part of it back again." The plaintiff was not allowed to recover.

But it is urged that the plaintiff paid under *duress*. I know of no case where *duress* has been applied to such a transaction as the one we are now considering. There was no duress of goods or property of the plaintiff. The mortgage belonged to

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another. The plaintiff had engaged to pay it. In fact he was liable on the bonds to which the mortgage was collateral. He could have tendered the amount due upon the mortgage, with the costs of the suit, and the mortgagee would have refused to receive it at his peril.

But a tender would have effectually protected the plaintiff. He wanted, however, an assignment of the mortgage. The mortgagee was not obliged to give an assignment, but he had agreed to do so. It was doubtless a convenience and advantage to the plaintiff to obtain an assignment and extension from the assignee of payment of the mortgage. But the assignment could, as it appears, be only had upon the payment of the amount of the mortgage to the mortgagee, and the costs and charges claimed by his attorney.

The defendant was not absolutely obliged to pay the sum demanded. He could, having made a tender, have withdrawn, and allowed the foreclosure suit to proceed upon his plea of tender, and his rights would have been guarded.

The cases where a person had been obliged to pay an unjust demand in order to get possession of goods or other property which he owned, or to the possession of which he was entitled, have no analogy to this action. *Scholey agt. Mumford* (60 N. Y., 498), is an illustration of a payment made under duress which was allowed to be recovered back.

In the case before us the right of the defendants to the sum in question, as a matter of law, was disputed. It was, nevertheless, paid. I do not think that it can be recovered back as paid under duress. The plaintiff's complaint must be dismissed.

The judgment was affirmed on appeal.

NOTE. — *Allowance under duress and voluntary payments.* — As to allowances in foreclosure actions, when discretionary, see section 3253 Code of Civil Procedure; upon subject generally and when allowances will be granted, sections 307, 308 of old Code, sections 3251, 3252 new Code; *McDonald agt. Mallory* (46 Superior Ct. R. 58); when can be granted only upon the entry of final judgment, *De Stuckle agt. Tehuantepec Railway Co.* (80 Hun, 34); *Lockman agt. Ellis* (58 How. Pr. R., 100); Rule 44.

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Duress. — Wallach agt. *Hoezter and others* (ante p. 196). There can be no duress as to land (*Fleetwood agt. City of New York*, 2 Sandf., 479).

Voluntary payments cannot be recovered back (*Mowatt agt. Wright*, 1 Wend., 355; *Flower agt. Lance*, 59 N. Y., 608; *Supervisors agt. Briggs*, 2 Denio, 39; *Windbiel agt. Carroll*, 16 Hun, 101).—[Ed.]

SUPREME COURT.

HARRIET BEAL agt. THE N. Y. C. AND H. R. R. Co.

Railroads—Real estate taken for railroad purposes—Use for which land is taken not limited in time—Time such use shall continue within the discretion of the legislature—Laws of 1833, chapter 294—Utica and Schenectady Railroad Company—Whether the company acquired a fee or mere easement in the land.

The Utica and Schenectady Railroad Company took a fee to the land taken by proceedings—in *inuitum*—under its charter, granted in 1833 (*Laws of 1833, ch. 294*), although the charter limits the duration of the company to fifty years.

Even assuming the plaintiff never to have been deprived of the fee in the premises in suit and still to be such owner, yet such ownership is subject to public use by defendants for railroad purposes, which use has not ceased or determined, and therefore she is not entitled to the possession of the property and cannot maintain this action (*Heard agt. The City of Brooklyn*, 60 N. Y., 242, and *String agt. The City of Brooklyn, distinguished*; *Terry agt. The N. Y. C. and H. R. R. Co.*, 67 Hus., 439, commented on).

Oneida Circuit, March, 1886.

THIS action is brought to recover real property and the possession thereof. The property in dispute is a portion of the road bed occupied by the defendant in or near the village of Amsterdam, Montgomery, N. Y. The facts are agreed upon and the only questions to be determined are questions of law.

The Utica and Schenectady Railroad Company was incorporated by an act of the legislature of the state of New York, passed April 29, 1833 (*chap. 294*), with authority to construct

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a single, double, treble or quadruple railroad or way between the cities of Utica and Schenectady.

By section 1 of that act it was provided the corporation should be vested with the right and privilege of building and constructing the road and using the same for and during the term of fifty years.

By section 7 it was provided the corporation was thereby empowered to purchase, receive and hold such real estate as might be necessary and convenient for its objects, and it should be lawful for the corporation to enter upon, take possession of, and use all such lands and real estate as might be indispensable for the construction and maintenance of the road, but all lands or real estate which were not donations should be purchased of the owner thereof, and at prices to be mutually agreed upon.

In case of a disagreement as to price and before making any portion of the road upon such lands, the directors of the corporation might present their petition to the chancellor, who should appoint three disinterested and competent freeholders of the county in which the lands were situated to be commissioners to appraise the lands. The commissioners should appraise the lands and should award to the owners thereof what they should deem to be the full value thereof, and should report their appraisal to the court of chancery. The chancellor should examine the report and determine on the same, and within thirty days after his determination, upon proof to the chancellor of the payment to the owner, or deposit to the credit of the owner in such bank as the chancellor should direct, of the amount of such appraisal and payment of all the expenses attending the appraisal, the chancellor should make a decree or order describing the lands and reciting the appraisal and the mode of making it, and all other facts necessary to a compliance with the section (7) of the act; and when the decree or order should be recorded in the office of the clerk of the county in which the lands were situated, the corporation should be possessed of all the lands for the purpose of the road, and might enter upon, take possession of and use the same; and by section

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19 it was provided the legislature might at any time alter, modify or repeal the act.

The corporation after it was organized, instituted proceedings under this statute to acquire title to the premises which are the subject matter of this action; the money therefor was paid, the decree or order was made by the court of chancery and was recorded in the clerk's office of Montgomery county May 19, 1836, and the corporation took possession of the premises, built and constructed the railroad and operated it over the premises until the year 1853, when the corporation was duly and legally consolidated with other railroad corporations into a corporation known as the New York Central Railroad Company, under and pursuant to the provisions of chapter 76 of the Laws of 1853.

By section 4 of that act it was provided that upon such consolidation being effected all and singular the rights, franchises and interests of the corporations so consolidated in and to every species of property, real, personal and mixed, and things in action thereto belonging, should be deemed to be transferred to and vested in such new corporation without other deed or transfer, and such new corporation should hold and enjoy the same, together with the rights of way and all other rights of property, franchises and interests, to the same extent as if the several corporations consolidated should have continued to retain the title and transact the business of such corporations, and the title and real estate acquired by either of the corporations should not be deemed to revert or be impaired by means of such consolidation or anything relating thereto.

This new corporation, from the time of the consolidation in 1853, maintained and operated its railroad over and along the premises in question until the year 1869, when it was legally and duly consolidated with the Hudson River Railroad Company, another railroad corporation, into a new corporation, known as the New York Central and Hudson River Railroad Company, under and pursuant to the provisions of chapter 917 of the Laws of 1869.

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By section 4 of that act (which differs in language to some extent from section 4, chapter 76, Laws of 1853), it was provided that upon such consolidation being effected all and singular the rights, privileges, exemptions and franchises of each of the corporations, and all the property, real, personal and mixed, and all the debts due on whatever account to either of the corporations, as well as all stock, subscriptions and other things in action belonging to either of the corporations, should be taken and deemed to be transferred to and vested in such new corporation without further act or deed; and all claims, demands, property, rights of way and every other interest should be as effectually the property of the new corporation as they were of the former corporations; and the title to all real estate taken by deed or otherwise, under the laws of this State, vested in either of the corporations, should not be deemed to revert or be in any way impaired by reason of that act, or anything done by virtue thereof, but should be vested in the new corporation by virtue of the act of consolidation.

Since this consolidation the New York Central and Hudson River Railroad Company has been and still is maintaining and operating the road over and along the premises in question.

The theory of the plaintiff's cause of action is, that she was originally the owner in fee of the premises in question; that the Utica and Schenectady Railroad Company, under its decree or order, recorded May 19, 1836, did not take a fee in the premises, but only an easement for railroad purposes for the term of fifty years, and that this term having expired by lapse of time, she is now entitled to be repossessed of the premises.

The defendant, on the contrary, claims, under the decree or order, the railroad company took title in fee to the premises and left no estate whatever in the plaintiff, and if it took an easement simply, and not a fee, the defendant is still entitled to use the premises for railroad purposes, although the fifty years have elapsed, and this because the term of fifty years has been extended by the legislature, and because the premises, having

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been taken for a public use, so long as that public use is continued there can be no reversion to the original owner.

C. W. White, for plaintiff.

D. M. R. Johnson, for defendant.

WILLIAMS, J.—The first question is, what estate passed under the decree or order in chancery from plaintiff to the railroad company? Was it an easement or a fee? If it be conceded the term of existence of the railroad corporation was fixed at fifty years, this fact would not have restricted the corporation from taking a fee (*Nichols agt. The N. Y. and E. R. R. Co.*, 12 N. Y., 121-128).

The question seems to be, what interest in the property the charter of the railroad company provided should be vested in or conferred upon the corporation.

The counsel for defendant argues, from the language of the charter this interest was a fee, and cites from *Wood's Railroad Law* (vol. 2, p. 764) the proposition:

"The question as to whether the charter authorized the taking of a fee or an easement is one of construction to be determined by the courts, in view of the language used in the act giving authority to take it, and of the purposes for which it was taken."

The counsel for plaintiff seems to rely mainly upon *Heard agt. The City of Brooklyn* (60 N. Y., 242), and *String agt. The City of Brooklyn* (68 N. Y., 1). These two cases, so far as the question we are examining is concerned, were practically the same. The question involved was what estate a railroad corporation took in lands appropriated by it under its charter (chap. 256, *Laws of 1832*), and it was held to be an easement and not a fee. A reference to the case in the 60th *New York* does not show this question was discussed at all by the court. RAPALLO, J. writing the opinion, merely says: "By the proceedings for the acquisition of the lands in question, under the act incorporating the Brooklyn and Jamaica Railroad Company

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(*Laws of 1832, chap. 256*), the company became entitled only to the use of the land for the purpose of operating its railroad; the fee remained in the original owners, subject only to that use, and on the discontinuance of the use the owners were entitled to resume possession of the land."

In the 68th *New York*, FOLGER, J., writing the opinion upon the subject says: "The decision of this case in the 60th *New York* was put fairly upon the ground that whatever interest the railroad company had in the lands in suit *had ceased*, and that on that cessation the plaintiffs were entitled to resume possession, that the fee remained in the plaintiffs, and that the right of the railroad was a right to use for the purpose of operating its road and no more. The appellant here strives to make out that the lands were not taken for a mere right of way or other easement, but that there was an appropriation of the lands; an examination of the charter shows that the railroad company was authorized to appropriate the lands, *but only for its own use*, for the purpose contemplated by the charter. That purpose was to maintain and continue a railroad for fifty years over a designated route. All the legal proceedings for the taking of the lands show that such was the appropriation made, and that *the damages were assessed for such an appropriation*. The right of appropriation was given and exercised, but it was only for a use, limited in time and in kind or purpose. Having held before in this case that the purpose and use for which the appropriation was made, and for which the damages were assessed and paid, *had ceased by the acts of the railroad company*, we will adhere to that decision until reason for change is shown in a new state of facts."

Referring to the act incorporating the railroad corporations in these two cases (*chapter 256 of Laws of 1832*), we find it provided by section 16 that in case the corporation should not be able to acquire the title to the lands by purchase or voluntary session, it should be lawful for it to appropriate so much of the lands as should be necessary to its own use for the purposes contemplated in this act; by section 17 it should present to the

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vice-chancellor a petition, among others things praying for the appointment of appraisers to *assess the damages* which the owners would sustain by reason of the appropriation thereof by the corporation to its own use; by section 19 the vice-chancellor should appoint three disinterested freeholders for the purpose of assessing *such damages*; by section 20 the appraisers should proceed by viewing the lands, and by such other evidence as the parties might produce before them to ascertain and assess *the damages* which the owners would sustain by an appropriation of their lands for the use or accommodation of such railroad or its appendages; by section 21 the appraisers should make a report to the vice-chancellor, among other things specifying *the damages* which the owners would sustain by reason of the appropriation of their lands for the purposes aforesaid, and the vice-chancellor might modify the assessment as should appear just; by section 22, on payment of the damages thus assessed, with the expenses of assessment, or depositing same in bank directed by vice-chancellor, the corporation should immediately become entitled to the *use of the lands* for the purposes aforesaid.

These provisions of the charter would seem to leave no doubt but a mere easement was given the corporation by this act. The counsel for plaintiff here claims this charter and the charter of the Utica and Schenectady Railroad Company (*chapter 294, Laws of 1833*) are substantially alike. If they were, I should have no difficulty in holding the plaintiff never parted with the fee in the premises in question.

By the charter we have here to interpret, it was provided the corporation might *purchase and receive donation of, and hold* such real estate as was necessary or convenient, *and it should be lawful for it to enter upon, take possession of and use* all such lands as might be *indispensable* for the construction and maintenance of the road, *but* all lands which were not *donations* should be *purchased*, and at a price to be mutually agreed on, and in case of a disagreement as to *price*, application might be made to the court of chancery, and persons should be appointed to appraise

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the lands (not the damages for the use of them) and the appraisers should award to the owners what they should deem to be the full *value* of the *lands* and upon payment of this appraisal (the full value of the lands) and all expenses of the appraisal, the decree or order should be made.

So far it seems to me every word of the charter points to the acquiring of the fee in the lands, and not an easement merely. It is said the corporation may have the land, but it must *purchase* it if not *donated*, and it must *pay* on such *purchase* a *price to be agreed on*, and only in case of *disagreement as to price* are appraisers to be called in, and then they are to appraise the lands and to award to the owner the *full value thereof*. Upon payment of the full value, practically the price fixed by the appraisers on account of the inability to agree on the price to be paid upon a purchase, was it not intended the corporation should acquire the fee to the property? Any other construction, it seems to me, would be unjust and unreasonable. The only difficulty, if any, in assenting to this construction, arises from the remaining provision in regard to the matter, viz., when the decree or order should be recorded the corporation should be possessed of the lands for the purposes of the road, *and might enter upon, take possession of, and use them*.

This language, standing alone and not read in connection with the provisions heretofore referred to, would not seem to imply the interest acquired was a fee or anything further than an easement for railroad purposes. I think, however, when this language is read with that before it, the whole is consistent and implies a *fee*, and not a *mere easement*, was intended by the charter to be acquired. It will be seen the provision at first was that it should be lawful for the corporation to *take possession of* and *use* all lands that were *indispensable*. This language has, however, connected with it a "but" condition, which must first be complied with before the corporation could so take possession of and use the lands. This condition was a purchase at a price, and the statute then goes on to provide for fixing the price at which the purchase could be made. And finally, hav-

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ing made provisions for all the conditions, the *but* in connection with its first statement that the corporation might enter upon and use the lands in compliance with all the provisions, it is finally again, in substantially the same language, provided that the corporation might take possession of and use the lands.

I am unable to perceive how the cases relied upon by plaintiff's counsel afford us any precedent for the construction of the charter we are here considering, and I am unable to arrive at any other conclusion but the one favorable to the defendant in this question, that the corporation acquired a *fee* and *not a mere easement*, in the premises in question, under and by virtue of the decree or order of the court of chancery.

The case cited and discussed by counsel upon both sides of this case (*Terry agt. The New York Central and Hudson River Railroad Co.*, 67 *How. Pr.*, 439), was in many respects entirely like the one we are here considering. It was unlike this case, however, in that the railroad corporation which originally appropriated the lands in suit, the Tonawanda Railroad Company, had a charter entirely unlike the charter of the Utica and Schenectady Railroad Company, and one under which an easement, and not the fee, was clearly acquired (*see chap. 241, Laws of 1832*). It was a charter containing the same identical provisions as to the acquisition of lands as those in chapter 256 of laws of 1832, which are heretofore given in considering the cases in the 60th and 68th *New York*. This case was tried at the Genesee circuit in September, 1884, and, so far as I am aware, the decision there made has never been reversed, overruled or criticised. It was against this same defendant, and judge HAIGHT held the plaintiff to be the owner in fee of the lands in suit, but subject to a public use for railroad purposes, and the time such use should continue was within the discretion of the legislature and not confined to the fifty years, which was the term of existence of the corporation that acquired the lands prescribed in its charter; that such use had not as yet ceased and determined, and therefore the plaintiff could not recover.

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It seems to me the counsel for the plaintiff at the argument of our case, did not appreciate the ground upon which judge HAIGHT came to his conclusion in that case. His position was, not that the lands were originally appropriated for fifty years and no more, and yet the legislature might, without the consent of the owner of the lands, extend this fifty years to five hundred years; such a position would hardly be tenable. He says: "The corporation was at first created for the term of fifty years. The legislature, however, reserved to itself by section 30 the right at any time to alter, modify or repeal the act; it had thus the power to shorten or extend the time that the corporation should exist. The legislature has seen fit to extend its corporate term for the period of 500 years; if, therefore, the lands were taken under this act for the life-time of the corporation, subject to the power of the legislature to shorten, discontinue or extend such corporate life, then I fail to see how the plaintiff can recover. In determining this question the act must be determined by reading the various sections in connection with each other. Section 1 creates the corporation for fifty years, but by section 30 the time may be lengthened, shortened or the corporation at any time discontinued; so that it is the same as if section 1 read that the corporation, and for the term of fifty years from the passage of this act, or such other time as the legislature shall provide, shall continue to be a body corporate and politic. Section 16, in giving authority to acquire and appropriate lands, provides that it may do so for the purposes contemplated by the act; and section 22, in providing that the railroad company may take possession of the land after the payment of the damages as appraised, provides that it shall be entitled to the use of the said lands for the purposes aforesaid."

If I may be permitted to add to this argument in the same direction judge HAIGHT has taken, I should say: The sections providing for the acquisition of lands did not provide such use should be for fifty years and no more; *time* was not designated at all in these sections, but only the *purpose*, that of maintain-

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ing a railroad. It is claimed to be inferred such acquisition was only fifty years because the life of the corporation was only fifty years. The act, however, reserved to the legislature the right to, and it might extend the life of the corporation in carrying out the purpose of maintaining a railroad. When, therefore, the lands were acquired and damages appraised and paid to the owners, all parties knew and understood the acquisition of the lands under the charter was for no certain, definite time but was for a purpose, a public use, and the time the user of the lands should continue for such purpose was discretionary with, and might be determined by the legislature. In this view of the matter, no rights of the property owners would be interfered with or invaded by the legislature, and at the same time a very satisfactory principle would be maintained that where property has been taken for public use, so long as that public use is continued with the concurrence of the legislature, the land should not revert to the original owner.

This decision of judge HAIGHT is authority for the proposition urged by defendant here, that assuming the plaintiff never to have been deprived of the fee in the premises in suit and still to be such owner, yet such ownership is subject to public use by defendants for railroad purposes which use has not ceased or determined, and therefore she is not entitled to the possession of the property and cannot maintain this action.

In the 60th and 68th *New York* the reason why the lands were held to have reverted to the original owners, was not that the existence of the corporate life had terminated, but the lands had ceased to be used for the purpose of maintaining a railroad, had been abandoned for such purposes.

My conclusion is that the plaintiff cannot maintain this action, and the defendant is entitled to judgment dismissing her complaint, with costs.

Formal findings may be agreed upon between parties in accordance with the suggestions in this opinion, and presented for signature. If not agreed upon I will settle same.

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NEW YORK COMMON PLEAS.

DANIEL S. MCELROY, plaintiff and respondent, agt. MORRIS B. BAER and MORRIS B. BRONNER, substituted defendants and appellants, in place of J. Morgan Howe, original defendant and respondent.

*District court—Practice as to interpleader—Code of Procedure, section 122—
Code of Civil Procedure, section 2876.*

The statutory interpleader, which is not in the nature of a suit in equity, but a remedy designed for use in common law courts, is a measure of relief to which suitors in a district court in the city of New York may resort.

In the district courts, after the order of interpleader is made, a copy of the order and a copy of the complaint, drawn in conformity with the suggestion made in *Moak's Van Santvoord's Pleadings*, should be served upon the party brought in by the interpleader. The order should require him to appear and answer the complaint in the same time that a defendant is required to answer a summons, and should provide that the money in court shall be paid to the plaintiff in case of the failure to appear and answer of the party interpleaded.

If the party appear and answer, the issue raised may be tried by the court, unless a jury be demanded at the time of the joinder of issue. Upon the entry of judgment the money must be paid to the prevailing party, unless an undertaking sufficient to stay proceedings be given, and costs should be awarded against the losing party.

General Term, March, 1886.

Before VAN HOESEN and ALLEN, JJ.

THIS was an appeal from the sixth district court. The action was brought originally against J. Morgan Howe, to recover for broker's commission on the sale of a house and lot in this city. Morris B. Baer and Morris B. Bronner, composing the real estate firm of Morris B. Baer & Co., had also claimed the same commission. Howe obtained an order to shew cause why they should not be substituted as defendants in his place. The motion was opposed both by plaintiff and Baer and Bronner,

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and was granted, upon which Howe paid the fund in dispute into court. After the interpleader thus made, Baer and Bronner failed to answer, the plaintiff took judgment by default, and the deposit was paid to him. Baer and Bronner then appealed. The point raised was the invalidity of the interpleader.

Frederick R. Lee, for plaintiff and respondent.

W. T. Birdsall, for substituted defendants and appellants, cited 26 *N. Y.*, 418; *sec. 2876 Code of Civil Procedure*; 13 *Hun*, 157; 15 *Barb.*, 47; 6 *Wend.*, 654.

John C. Gulick, for original defendant and respondent, cited *Rauch agt. Dreyer* (3 *Daly* 434); *Beer agt. Benner* (11 *Daly*, 229); *sec. 2876 Code of Civil Procedure*.

PER CURIAM.—It is settled by the decisions of this court, in *Rauch agt. Dreyer* (3 *Daly*, 434), and *Beer agt. Benner* (11 *Daly*, 229), that the statutory interpleader, which is not in the nature of a suit in equity, but a remedy designed for use in common law courts (*see the English statute, entitled 1 and 2 Wm. IV., chap. 58; 23 and 24 Vict., chap. 126*), is a measure of relief to which suitors in a district court in the city of New York may resort. It is to be regretted that when the framer of section 122 of the old Code of Procedure borrowed from the English statutes that we have mentioned the idea of permitting a defendant in an action at law to obtain in a summary way in that action the same relief that he might obtain by filing a bill of interpleader in a court of equity, he did not at the same time borrow the procedure which those statutes created.

The consequence of borrowing only the relief and of omitting to provide a way by which that relief can be attained, has been to throw upon the courts of this state the necessity of framing for themselves a system of practice that will make the statutory interpleader effectual. One of the first efforts in that direction was made in the case of *Van Buskirk agt. Roy* (8 *How*.

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Pr., 425), in which the court directed that the order should provide that if the party interpleaded did not appear and defend the action within twenty days after the service upon her of a copy of the complaint, together with a copy of the order of interpleader, the money in court should be paid to the plaintiff. The Code nowhere provided for these proceedings, but they were adopted because in no other way could effect be given to the intent of the legislature in creating the remedy of an interpleader in a common law action. Perhaps the action of the court might be called judicial legislation.

Again, in *Lawrence agt Wilson* (8 *Hun*, 593), the court said: "As the Code prescribes no mode of proceeding under this section, the practice under it should be, I think, as far as practicable, that adopted by the courts of equity in cases of interpleader in analogous cases." The court then recommends that the practice be such as is suggested by *Moak's Van Santvoord's Pleadings*, 358.

We see the wisdom of the course recommended by the court in the case last cited, and are of the opinion that in the district courts, after the order of interpleader is made, a copy of the order and a copy of the complaint, drawn in conformity with the suggestion made in *Moak's Van Santvoord's Pleadings*, should be served upon the party brought in by the interpleader. The order should require him to appear and answer the complaint in the same time that a defendant is required to answer a summons, and should provide that the money in court shall be paid to the plaintiff in case of the failure to appear and answer of the party who is interpleaded. If the party appear and answer the issue raised may be tried by the court, unless a jury be demanded at the time of the joinder of issue. Upon the entry of judgment the money must be paid to the prevailing party, unless an undertaking sufficient to stay proceedings be given, and costs should be awarded against the losing party. It may be that Baer and Bronner intentionally abandoned the case when the district court decided that they should be brought in by interpleader, but we are not able to say that such was their

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intention. It is possible that they left the court because they did not expect any further proceedings without some further notice. We prefer to place that interpretation upon their acts, because they have not as yet had an opportunity to show their rights to the money in controversy.

Of course Dr. Howe is discharged from all liability, and he has no interest in or concern with the litigation that followed or may follow the payment by him of the money into court. We think it proper to reverse the judgment and order a new trial, with costs to abide the event. Let the district court amend its order so that Baer and Bronner shall answer in the usual time. Then let the plaintiff serve upon them a new complaint, drawn in conformity with the suggestions already referred to. If Baer and Bronner fail to appear, let judgment be entered establishing the right of plaintiff to the money. If they appear and answer, let the issue be tried and the money awarded to the prevailing party.

The reversal of the judgment leaves the plaintiff without any adjudication in his favor as to his right to the money, and exposes him to liability to an action to be brought against him by Baer and Bronner for the money that was paid to him under the judgment that has been reversed.

Judgment reversed and a new trial ordered as between the plaintiff and Baer and Bronner, with costs to abide the event.

COURT OF APPEALS.

PEOPLE *ex rel.* VAN HECK agt. NEW YORK CATHOLIC PROTECTORY.

Children Begging—Commitment to Catholic Protectory—Penal Code, section 291—Effect of as to commitment.

Under section 291 of the Penal Code, the commitment of a child found begging in the streets, does not make such commitment absolute, final or un-

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conditional, but such commitment is to be governed by the charter and rules of the institution to whose care he is consigned.

Heretofore, under the consolidation act the magistrate could commit the destitute child to but one of the three specified institutions, and the only effect of the first alternative of section 291 is to permit the magistrate to commit such child to any charitable or reformatory institution authorized by law to take charge of minors; but in every case the institution so authorized was left to take and hold the child for the time, and in the manner and under the regulations prescribed by its fundamental law.

Decided, January, 1886.

Elbridge T. Gerry, for appellant, New York Catholic Protectory.

F. R. Coudert, for the people.

FINCH, *J.*—A police justice of the city of New York, on the 5th day of November, 1884, committed John Van Heck, a boy of the age of nine years, to the Catholic Protectory, for begging in the streets, in violation, as the commitment asserted, of the consolidation act of 1882, of the Penal Code, and of the Code of Criminal Procedure. Under which of these acts the magistrate proceeded he did not at all determine, and we have no means of knowing. The commitment directed that the child should be and remain under the guardianship of the protectory "until therefrom discharged in the manner prescribed by law." There is no provision for his discharge, unless the requirements of the charter of the protectory, which determine how long he may be held by that institution, are unrepealed and remain applicable to the case. More than twenty days after this commitment, and on the 23d day of the following December, a writ of *certiorari*, and on the 15th day of January, in the next year, a writ of *habeas corpus*, were issued to inquire into the detention of the child. The process was awarded upon the petition of the father, who alleged that the act of the child in soliciting alms, if such act did occur, was not due to the petitioner's neglect or misconduct; but that the child had been an attendant at the city schools from the 16th day of April, 1884, to the 1st of Novem-

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ber, 1884, just five days before he, with his mother, was arrested for beggary. He further alleged that the child had never been guilty of violating section 290 of the Penal Code, as recited in the warrant, and that is admitted, the answer being that section 291 was intended, and the reference to section 290 was a clerical error. He further alleged that no notice, as required by law, was given to him, either by personal service or by posting in the station-house.

As the mother was arrested with the child, and very probably herself committed, the father was left to miss his son and find what had happened to him as best he might be able. And, upon discovering the facts, he is met by the contention of the protectory that the commitment is final, and no notice to the father was requisite, and he had no right to be heard upon the question of the disposition of his child; and that is said to result from the effect of section 291 of the Penal Code, which is claimed to have made unavailing and inapplicable the wise and prudent provisions of the charter of the protectory. That institution is a very worthy and commendable charity, intended, primarily, for the benefit of catholic children, and to save them from suffering, and throw over them the care and protection of the catholic church (*Laws 1863, chap. 448*). The New York Juvenile Asylum is a similar charity, having in its charter corresponding provisions as to notice, and intended, primarily, for the benefit of protestant children.

If a police magistrate of the city may commit a child of tender years, found soliciting alms in the street, without notice to the parents, and giving them an opportunity to be heard, several results may follow. A boy, nine years old, may have begged in the street without the knowledge of his parents, or any cause or occasion, so far as they were concerned; he convicted without the least chance of defense or explanation; be sent to one or the other of these institutions permanently during his minority; and without the least opportunity for redress; for the construction of the Penal Code which makes the com-

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mitment absolute and final, and sweeps out a part of the terms on which the institution can receive and hold the child, must necessarily sweep them all out, and, among the best, section 1623 of the consolidation act, which directs the corporation, when it shall be made to appear to its satisfaction that the child has been committed "on insufficient cause, false or deficient testimony, or otherwise wrongfully or improvidently committed," to discharge the child. If not, an absolute commitment by the magistrate may be reversed by the protectory. It may further result that where the beggary and destitution were real, and a commitment proper, the magistrate may ignorantly and innocently, or following the drift of his own denominational convictions, send the child of catholic parents to be educated and brought up under protestant influences, or the reverse.

Those relating to the protectory are found in the consolidation act, and were substantially copied from the charter of the institution passed in 1863, and subsequent acts amending it. By section 1618 a magistrate of the city may send to the protectory children between the ages of seven and fourteen, found in any street or public place, "in circumstances of want and suffering, or abandonment, exposure, neglect, or of beggary;" and the form of commitment is described. The child is to be conveyed "to the house of reception established by said corporation; and such child is to be there detained until removed or discharged as afterwards provided.

Section 1619 commands that "*immediately* upon the making of such order the magistrate or court making the same shall deliver to a policeman of the city, especially detailed for that purpose, a notice in writing, addressed to the father of such child, if its father be living and resident within the city, and, if not, then to its mother, if she be living and be so resident, and, if there be no father or mother of such child resident within the city, then addressed to the lawful guardian of such child, if any, or to the person with whom, according to the examination of the child and the testimony, if any received by

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such magistrate or court, such child shall reside, in which notice the party to whom the same is addressed shall be informed of the commitment of such child to the house of reception of said corporation; and shall be notified that, unless taken therefrom in the manner prescribed by law within twenty days after the service of such notice, the child therein named shall be committed to the asylum of said corporation." Section 1620 provides for the personal service of the notice, and if that has proved impossible, then for a substituted service by posting a notice, the form of which is prescribed, in the police station nearest the alleged residence of the child. By section 1621, if, within the twenty days, the parent or other person shall prove, to the satisfaction of the committing magistrate, that the suffering or destitution has not been occasioned by the habitual neglect or misconduct of the parents or guardian, the magistrate is required to order the child to be discharged; but by section 1622 it is directed that in case no such proof is made, or nobody appears, the magistrate shall transmit to the superintendent of the protectory a notice to that effect, whereupon the child shall be removed to the asylum of the corporation. Section 1623 we have already referred to as providing for a discharge by the corporation, not only when satisfied that the commitment was without due cause, but whenever circumstances after occurring render it proper or expedient.

It is obvious that these provisions relate, not to a case of crime, but one of misfortune, on the part of the child, and often of the parents. They result in depriving the latter of their children, to whose care and custody they have a natural right, and the injustice of doing so without giving them opportunity to be heard and to show the real facts is sedulously avoided. All this wise and careful provision results in a double opportunity of the parent to be heard. During the twenty days he may satisfy the magistrate that the begging was no fault of his, and after the twenty days he may apply to the protectory. The section of the Penal Code which is said to override and change all this is as follows: After describing the children to

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whom it applies as those begging, homeless orphans or children of criminals, frequenting the company and dens of thieves and prostitutes, it authorizes the court or magistrate to commit the child to *any* charitable reformatory or other institution authorized by law to receive and take charge of minors, or may make any disposition of the child such as now is or hereafter may be authorized in the cases of vagrants, truants, paupers or disorderly persons.

There is nothing in this section which repeals by implication any of the provisions of the consolidation act. It authorizes a commitment. As the general term suggest, it does not say it shall be absolute, final, unconditional. Most clearly it means that the magistrate, knowing the authority of the different institutions to receive and retain, and the existing limitations upon that authority, may select from among them that which he deems most fitting. The enactments can be read together and easily stand together without the least clash or conflict; and where that can be done our duty is to reconcile them and give to each its operative force. A further rule of construction points to the same result. The provisions of the consolidation act defining the authority of the protectory are local and special, confined to the city of New York, and having respect to its situation and needs; the provision of the Penal Code is general and applying to the state at large. It is the uniform rule that such a special and local act is not repealed or modified by the later general one, unless some specific words plainly disclose that intention. We are bound to apply these rules, and especially so in a class of cases which involves questions of personal liberty and parental control. A construction which stands upon the Penal Code alone, and rejects the influence and modifying effect of the charters, is very clearly shown to be inadmissible by an illustration suggested by the learned counsel for the respondent.

Under section 1466 of the consolidation act certain females over fourteen and under twenty-one may be committed to the Protestant Episcopal House of Mercy, or the Roman

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Catholic House of the Good Shepherd. These institutions answer the sole description of the Penal Code as "authorized by law to receive and take charge of minors;" and so, on the construction claimed, this boy might have been lawfully committed to one of those institutions. The same thing would be true as it respects the New York Infant Asylum, which is authorized to receive children of two years or under, and as it respects the American Female Guardian Society, which receives girls under fourteen and boys under ten. Could a boy over fourteen, but under sixteen, be committed to this latter institution by force of the Code? Institutions abound by whose fundamental law they are fitted and adapted to each of the varying forms of misfortune and vice. Does the Penal Code disregard this fitness and adaptation, and mean to substitute for it the unlimited discretion of a magistrate?

The learned counsel for the appellants put stress upon the alternative provisions of section 291, which permit the magistrate to commit the child to a charitable institution, or "make any disposition of the child such as now is or hereafter may be authorized in the cases of vagrants, truants, paupers or disorderly persons." Different classes of children are brought within the section, and obviously require very different treatment. These are children found begging; those who are homeless; destitute orphans; children of convicted criminals living with them, and those frequenting concert and liquor saloons, or associating with thieves and prostitutes. If the Penal Code means that a child who is merely homeless, or a destitute orphan, may be punished as a disorderly person, it is extremely harsh and unjust. But its meaning is much more sensible. The section itself provides that the child must be proceeded against "as a vagrant, disorderly or destitute child," and whichever is selected as the ground of complaint must be supported by the proper and competent proof. The complaint here and its proof was, not that the child was disorderly or destitute, but that it was a vagrant. Under the Revised Statutes a child found begging was classed with vagrants, and sent to the county house or

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the alms-house till discharged by the superintendent of the poor, and without notice to the parent, as it is said may be done now (1 R. S., sec. 4; *Code Crim. Proc.*, secs. 887, 893). But in such case the child passes into the custody of public officers authorized to discharge, and as public officers amenable to authority, and naturally anxious to lessen the public burden at the earliest opportunity. When, in such a case, a private charity was substituted as the custodian, whose officers are but individuals, and governed by their own charter instead of the public law, it is not to be supposed that restrictions and limitations, prudently and carefully interposed to fit the emergency, were intended to be taken away and suddenly and without reason deemed unnecessary.

We are impressed with the conviction that the sole effect of the first alternative contained in section 291 is to permit the magistrate who theretofore, under the consolidation act, could commit the destitute child to but one of three specified institutions, to commit such child to any charitable or reformatory institution authorized by law to take charge of minors, but in every case the institution so authorized was left to take and hold the child for the time and in the manner and under the regulations prescribed by its fundamental law.

The order should be affirmed, with costs.

All concur, except EARL, J., not voting, and MILLER, J., absent.

COUNTY COURT.

• GEORGE W. CARTER, respondent, agt. JAMES W. WALLACE,
appellant.

Code of Civil Procedure, section 1011—Reference by stipulation—The court must appoint another referee if new trial be granted.

Under section 1011 of the Code of Civil Procedure, as amended by chapter 542 of the Laws of 1879, it is imperative on the court to appoint another

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referee where a new trial is granted in an action tried before a referee named in the stipulation to refer, "unless the stipulation expressly provides otherwise."

Steuben County, March, 1886.

THIS action was originally tried in justice court where a judgment was rendered in favor of the plaintiff and against the defendant for \$145.30. Defendant appealed for a new trial to the Steuben county court. It was referred, by stipulation, to A. Hadden, Esq., referee, tried and a judgment entered on his report for \$249.98, from which the defendant appealed to this court. The case was argued and judgment affirmed. A reargument was afterward granted, and on such reargument the judgment was reversed and a new trial ordered before another referee. A motion was made in this court for an order setting aside or vacating the order of reference and for a jury trial. The general term sent the motion to the county court to be heard there. The defendant made a motion before the county court for the appointment of a referee. The plaintiff made a motion at the same time to be relieved from the order of reference and be at liberty to try the case before a jury. The county court denied the plaintiff's motion and granted the defendant's motion, and appointed George N. Orcutt, Esq., referee, the law partner of Horace Bemis, Esq., who helped try the action before A. Hadden, the former referee.

Burrell & Robinson, for appellant.

I. Section 1011 of the Code of Civil Procedure provides: "If a new trial is granted in an action tried by a referee, the court must appoint another referee." Can this be so? An action once referred always referred? A party once persuaded to have his case tried by a particular referee that he has confidence in, must be compelled to have it tried afterwards by a referee he does not know. This statement seems monstrous.

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To have this case tried by a jury is a constitutional right. "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law" (*Const. state of New York, art. 1, sec. 2*). Has the trial by jury been waived in the manner prescribed by law? The modes prescribed by law are contained in section 1009 of the Code of Civil Procedure. This does not come within either proposition. This action was not referable without consent of the parties, by consenting to refer to a particular referee does not waive his right to a trial by the court and a jury, if for any reason the reference agreed upon falls through (*Burnes agt. Preston, 66 N. Y., 452; Sharp agt. Mayor of N. Y., 31 Barb., 578, 589*). The court nor neither party could compel the other to submit to a reference and when the court sets aside the referee agreed upon the case must take its place upon the calendar as though no reference had been agreed upon (*Sharpe agt. Mayor of N. Y., supra*).

II. The county court decided that "the amendment of 1879 to section 1011 of the Code of Civil Procedure seems to make it imperative on the court to appoint another referee." Further on he says, "it therefore seems that there is no alternative and this court must follow the section referred to and appoint another referee." The county court, without doubt, was misled by the case of *May agt. Moore (24 Hun, 351)*. We think the court fell into an error. That case is not controlling for all that appears; that was a case where a reference could have been forced upon either party, and is easily distinguished from the present case.

III. Before the amendment of 1879, when a new trial was ordered it went before the same referee, unless the court vacated the order of reference. The defeated party had to submit to a retrial before the referee with his views and prejudices of the former suit, or be put to the unpleasant task of removing a competent referee by motion, if the prevailing party refused to stipulate him out of the way. Without doubt, to get rid of

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this state of things this amendment was made (*Sharp agt. Mayor of N. Y.*, 31 *Barb.*, 589).

IV. The court must have the power to relieve a party from the effect of an order of reference, and in view of the trouble and expense that the plaintiff has already been put to in this case, twice tried, twice argued at the general term, it is fit and proper that it should be tried by a jury.

Eli Soule, for respondent.

I. The constitutional right to a jury trial in civil cases may be waived (*Baird agt. Mayor*, 74 *N. Y.*, 382-386). The constitution provides that a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law (*art. 1, sec. 2*). Section 1011 of the Code of Civil Procedure, as amended in 1879, prescribes the manner in which a jury trial may be waived in certain cases. *First*. Where the parties manifest their consent to a reference by a written stipulation signed by their attorneys and filed with the clerk, but do not name the referee in the stipulation, the right to a jury trial is absolutely and irrevocably waived. The court has the power to name the referee on motion of either party. *Second*. Where the stipulation names the referee, and he refuses to serve, the right to a jury trial is waived unless it is expressly reserved in the stipulation (*May agt. Moore*, 24 *Hun*, 351). *Third*. Where the stipulation names the referee and the action is tried by him, and a new trial is granted, the right to a jury trial is waived unless it was expressly reserved in the stipulation. In both of the last named cases the court is directed by the said section to appoint another referee.

II. The judgment of reversal orders a new trial before another referee, and that judgment is binding on the county court.

III. No reason is shown why the order of reference should be vacated. The action was referred, after due deliberation on

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the part of the appellant, who required only that it be referred to an honest man. It is not alleged that the referee named in the stipulation is the only honest man available for referee.

IV. The county court had power and authority to make the order; the appellant had waived his right to a trial by jury; the action had been tried by a referee named in the stipulation to refer; a new trial had been granted; the judgment of the supreme court ordered the new trial before another referee.

The order should be affirmed.

HAKES, *Ch. J.*—This action was referred by consent and tried before the referee agreed upon, who reported in favor of the respondent, and judgment was entered in his favor, which the appellant appealed to the general term of the supreme court. Upon a reargument the general term reversed the judgment, and ordered a new trial before another referee.

The respondent now moves to vacate the original order of reference, and be at liberty to try the case before a jury. The appellant had already made a motion for the appointment of a new referee, and by consent both motions are heard as one.

The amendment of 1879 to section 1011 of the Code of Civil Procedure seems to make it imperative on the court to appoint another referee where a new trial is granted in an action tried before a referee named in the stipulation to refer, "unless the stipulation expressly provides otherwise." Nothing of the kind is claimed as to the stipulation in this case. It therefore seems that there is no alternative, and that this court must follow the section referred to, and appoint another referee, unless something is shown calling for relief from the original stipulation and order of reference entered thereon.

It appears from the affidavit of the respondent, and also from that of his attorney, that the respondent was not favorable to a reference at and before he consented to refer the action—that he had more confidence in a jury; still, with these considerations in his mind, he consented to a reference to the referee, whose name was suggested by his attorney, and having thus

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consented to a reference of the case, he must stand by it, unless for some good reason shown to exist, of which he was ignorant at the time of consenting to the reference, he ought to be relieved from its binding force.

The reason now shown for asking to vacate the stipulation and order of reference, if not precisely, is substantially the same that were revolving in his mind at the time the stipulation was made. Courts frequently interpose to relieve a party from an order, contract, stipulation and the like, but upon a state of facts which are newly discovered, or when there has been a mistake, and especially where a fraud has been practiced upon him by an adversary.

The motion to vacate must be denied, and the motion to appoint a new referee must be granted, and an order may be entered accordingly, and designating George N. Orcutt, Esq., the referee, who is hereby appointed as such.

NOTE.—The order has just been affirmed by the supreme court, general term, fifth department.—[Ed.]

COURT OF APPEALS.

PEOPLE agt. DONOVAN.

Criminal law — Code of Criminal Procedure, section 527 — New trial — Powers conferred by this section as to new trial to be exercised by the supreme court.

The power given by section 527 of the Code of Criminal Procedure of ordering a "new trial, if satisfied that the verdict * * * was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below," was intended to be exercised by the supreme court alone, and does not apply to this court.

Decided January, 1886.

Charles H. Reed, for appellant.

Estate of Corn, deceased.

him surviving. On January 5, 1886, letters of administration were granted, upon the widow's petition, to herself and to Samuel Corn, the father of the decedent. On the same day also, in accordance with Mrs. Corn's petition, Samuel Corn was granted letters of guardianship of the person and estate of her infant son. She now asks the surrogate to revoke those letters of guardianship, and to revoke also the letters of administration so far as they confer any authority upon this respondent.

Mrs. Corn alleged in her petition that on or about January 3, 1886, the respondent advised her that "under the law it was necessary" that two administrators should be appointed for taking charge of her husband's estate and two guardians for protecting the interests of her child. She alleges further that the respondent told her that he had made arrangements for the appointment of himself and her as joint administrators and guardians; that accordingly, at respondent's request, she went to the office of his counsel, Mr. Dyett, and subsequently to the surrogate's office, and signed certain papers which she supposed to relate to the appointment of the respondent and herself as such guardians and administrators.

It appears by her petition that on the 5th of January, 1886, Mrs. Corn entered into a certain written agreement with the respondent under a misapprehension, as she claims, respecting its true nature and effect. A copy of that agreement is annexed to the petition. It substantially provides that administrator Corn shall have the sole care and custody of all the property of the estate until the distribution thereof, according to law, and recites that such authority had been yielded to him by the petitioner, because of his furnishing the sureties upon the administration bond, petitioner herself having been unable to procure the requisite security for her own appointment as sole administratrix. The petitioner insists that these recitals are false; that she was not informed before signing the agreement, and, when she executed it, did not in fact understand that she was virtually surrendering to the respondent the exclusive possession and control of the property of the estate.

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The opposing affidavits of the respondent allege that the agreement in question was drawn in duplicate after consultation between himself and the petitioner, and that the latter read it before execution; that at Mr. Dyett's request she also read the petition for the appointment of herself and the respondent as administrators, and that she took the same course in respect to the petition for appointment of the respondent as guardian of her son. Mr. Corn denies that he ever said to the petitioner that two guardians or two administrators were required by law.

It appears from the affidavit of Mr. Dyett that he prepared for execution the agreement and the two petitions; that he was present when Mrs. Corn signed the three papers; that he explained to her their contents and handed them to her for examination; that she apparently read them through and afterwards signed them without any protest and without suggestion that she did not thoroughly understand what she was doing.

The surrogate's authority to revoke letters of administration is solely derived from section 2685 of the Code of Civil Procedure (*O'Brien* agt. *Neubert*, 3 *Dem.*, 156). It cannot be claimed that the allegations of the petition in the case at bar would justify revocation under any of the subdivisions of that section except subdivision 4. Now can I find upon the proofs before me that the letters here in question were "obtained by a false suggestion of a material fact?" This expression first came upon the statute book at the adoption of the Code. The law previously in force applicable to this subject (*chap.* 460, *sec.* 84, *Laws of 1837*; 3 *Banks* [5th ed.], 164) provided that letters of administration might be revoked whenever it should appear to the surrogate that they had been issued "on or by reason of false representations made by the person to whom the same were granted." For that provision the one here invoked was substituted to cover such cases as were referred to by the supreme court in *Proctor* agt. *Wanmaker*, 1 *Barb. Ch.*, 302 (see *Throop's Code*, note to *sec.* 2685).

In *Proctor* agt. *Wanmaker*, it was held that independently of

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the statute of 1837, the surrogate had power to revoke letters of administration where there had been a *false suggestion* of a material fact or a lack of notice to the parties rightfully entitled to administration. The cases cited by the supreme court in support of that proposition were all cases in which letters had been revoked upon a discovery that false representations had been made *to the tribunal by which such letters had been granted*, or that from such tribunal the lack of proper notice had been concealed (*see Cornish* agt. *Cornish*, 1 *Lee's Ecc.*, 14; *Burgis* agt. *Burgis*, *id.*, 121; *Drummond* agt. *Hamilton*, *id.*, 357; *Smith* agt. *Corry*, *id.*, 418; *Lord Trimlestown* agt. *Lady Trimlestown*, 3 *Hagg. Ecc.*, 243).

Now, even upon the petitioner's own showing, I can not find that the respondent obtained his letters by any false suggestion to the surrogate of a fact material to the proceeding for the appointment of administrators. The petition must, therefore, be denied. It is not my intention in so denying it to pass upon any question as to the validity or effect of the agreement above referred to between the parties to this proceeding. Whether that is such an agreement as administrators may lawfully enter into, and as courts are bound to recognize, may hereafter become the subject of consideration, but need not now be determined.

I had occasion in deciding *Ledwith* agt. *Union Trust Company* (2 *Dem.*, 439) to review the grounds upon which the surrogate is authorized to remove a guardian appointed, as was this respondent, by virtue of title 7, chapter 18 of the Code of Civil Procedure. I adhere to the conclusion there announced, that as respects the guardianship of an infant's estate, the surrogate cannot revoke letters even though such revocation would seem to be for the best interests of the infant, unless facts are established which constitute a sufficient ground for revocation within one or more of the first five subdivisions of section 2832 of that Code. No such facts have been established in the case at bar. I do not discredit Mrs. Corn's allegation that when she signed the petition asking for the respondent's appointment as guar-

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dian she supposed that she herself would also be granted letters, and accordingly if such a course could properly be pursued I would now direct that she be associated with the respondent in the guardianship. But I have no power to give such a direction. It would be gratifying to the court if the respondent should pursue the course which his counsel at the argument of this proceeding declared would meet with his approbation—that is, to resign the guardianship and consent to the grant of new letters to himself and the petitioner. If he shall not see fit to adopt this course, a decree may be entered removing him from his office as guardian of the infant's person; for if the relations between the petitioner and the respondent are to be inharmonious the infant's welfare will, in my judgment, be promoted by substituting the former for the latter as his personal guardian.

COURT OF APPEALS.

MARTIN agt. RECTOR.

Ejectment—Actual occupant proper defendant—Occupancy a question for jury—Code of Civil Procedure, section 1502—When wife actual occupant.

As to who is the "actual occupant" of premises at the commencement of an action for ejectment, and so a proper defendant (2 R. S., 804, sec. 4, new Code of Civil Procedure, sec. 1502), is a question of fact for the jury; and when the title was in the wife they might properly find that she was the "actual occupant," even though her husband cultivated the soil, &c. (RAPALLO and EARL, JJ., dissent.)

Decided January, 1886.

PLAINTIFF, on the original trial of the action for ejectment, recovered judgment for possession for non-payment of rent, and was put in possession by the sheriff. On appeal by the defend-

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ant, the general term reversed the judgment, and ordered a new trial, on which a verdict was rendered for defendant, who entered judgment for costs and for restitution to the premises, and was restored upon the proper writ. By an order of the special term this was set aside, and the sheriff directed to restore plaintiff; but this order of the special term was reversed in the general term (28 *Hun*, 409), and the relief asked for by defendant granted. From this appeal is brought.

Mr. Cowen, for appellant, Robert C. Martin.

Mr. Miller, for respondent, Jacob S. Rector.

DANFORTH, *J.*—That the plaintiff was the grantee of the original lessor, that rent was due from the lessee, and unpaid, and that the devise contained a condition for re-entry upon the land in question for non-payment of rent, was conceded; but the land was occupied, and no recovery could be had, unless the defendant was, at the beginning of the action, the actual occupant of the premises (2 *R. S.*, 304, § 4). Whether he was such occupant was the question litigated at the trial. The plaintiff there claimed that the evidence was all one way, and of such force as to require the trial court to withhold it from the jury, and direct a verdict for him. The judge declined to do so, and, upon submission to the jury, their verdict was in favor of the defendant, as was also a special finding that "he was not the actual occupant of the premises at the time of the commencement of this action."

We think the learned court did not err. By force of the statutes relating to the property of married women (*Laws* 1849, *chap.* 375), the wife may take the equitable or legal title to real and personal property, and hold the same to her sole and separate use, as though she were unmarried. She might, therefore, cultivate the land and manage the personal property, either in person or by means of any agency which any other owner of property might employ (*Knapp agt. Smith*, 27 *N. Y.*, 277;

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Draper agt. Stouvenel, 35 *id.*, 507; *Rowe agt. Smith*, 45 *id.*, 230; *Bodine agt. Killeen*, 58 *id.*, 93; *Wood agt. Wood*, 88 *id.*, 575). Whether she was doing so in this case, or whether she had given to the defendant, her husband, the possession of the premises, was the real subject of contention, and to be determined as a question of fact (*Alexander agt. Hard*, 64 *N. Y.*, 228).

That the title was in her was unquestioned, and, without her consent, he could have no legal possession; and, therefore, could not have even that rightful temporary use of the soil, without which one could not be, in the language of the statute, an "actual occupant." In behalf of the plaintiff he at one time testified, on examination before trial, but after suit commenced, that he "was in possession at the time of the commencement of the action, and with that general testimony the plaintiff rested. But afterwards the facts constituting the possession and occupancy of the premises were disclosed, and, it appearing that the land was given to Mrs. Rector by her father, the defendant testified: "My wife went upon those premises in pursuance of that; I went there with my wife; the property was given to her, and, of course, I went there and lived with her; that was the only reason I went there; I occupied the premises in no other way than that." "She continued," he says, "to live upon and occupy these premises" for many years, and until a short time before the trial, and whatever he did was by her directions, or, as he says, he was the acting man under his wife. She testifies that she went into possession at the time the farm was given to her, long before the commencement of the action, and continued in possession from that time, personally residing upon and occupying it; that she never gave the possession of the premises in any way to her husband. Upon this testimony the jury might well find that the defendant was not the "actual occupant." He was there as husband, servant, agent—not as one having, in relation to the land, any right or interest or power of control. In neither capacity did he occupy within the meaning of the statute. Nor were they in posses-

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sion jointly. The possession was always her possession. If ousted by her husband or other person, she could bring an action to recover possession. Before the acts (*supra*) the husband, *jure mariti*, had a right to the possession of his wife's land, and as her head he might be presumed to be in occupation. It is now different. The wife, as well as the husband, may own lands free from the other's control, and there can be no such presumption. He may still be the head of the family, without being in any legal sense the possessor or actual occupant of the house or land in or upon which the family reside. But upon the whole evidence it was properly left for the jury to say whether the defendant was the actual occupant; and their verdict, rendered, as we think it was, under proper instructions, is conclusive.

We, therefore, agree with the general term, and think the judgment appealed from should be affirmed.

ANDREWS, MILLER and FINCH, JJ., concur; RAPALLO and EARL, JJ., dissent; RUGER, Ch. J., not voting.

NEW YORK COMMON PLEAS.

WILLIAM LESSELLS *et al.* agt. GEORGE A. FARNSWORTH.

Lien — Of livery stable keeper — Extent of — Right to, not cut off by sale of the animals — Laws of 1872, chapter 498, as amended by chapter 145, Laws of 1880.

Under chapter 498, Laws of 1872, as amended by chapter 145, Laws of 1880, a livery stable keeper has the right to detain horses until all charges for their board and keep are paid, provided he serves a notice, in writing, containing the amount of the charges and of his intention to detain the animals therefor.

The livery stable keeper has a reasonable time after the board becomes due in which to prepare his bill of charges and serve the notice of lien, and the right to such lien is not cut off by a sale of the animals by the owner before the statutory notice is given.

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The statute is a remedial one and should be liberally construed.

The possession of the animals by the stable keeper is constructive notice to a purchaser of the right to the lien. (*Affirming S. C., ante, 793.*)

General Term, April, 1886.

Before LARREMORE, C. J., DALY and VAN HOESEN, JJ.

APPEAL by plaintiffs from an order of the general term of the city court reversing a judgment in favor of the plaintiffs, entered upon a verdict directed by the court at trial term.

The action was for the conversion of three horses. The defendant, a livery stable keeper, claimed a lien upon the horses for their keep from February to June, 1884, inclusive, under a contract with the owner, D. M. Walduck, from whom plaintiffs purchased said horses on June 11, 1884.

It appeared from the evidence that the defendant was notified of the sale to the plaintiffs on June 15, 1884, and that he did not give the notice of lien required by the statute until July 2, 1884.

A. J. Delaney, for appellants.

Jacobs Brothers, for respondent.

J. F. DALY, J.—According to the provisions of the statute which gives to livery stable keepers the right to detain horses until all charges for their keep or board are paid, no lien is acquired and no right of detention accrues until notice in writing of the amount of such charges and of the intention to detain the animals is first given to the owner (*chap. 498, Laws of 1872, amended by chap. 145 of the Laws of 1880*).

The question arising in this case is, whether the right to such lien is cut off by a sale of the animals before the statutory notice is given. If the answer to the question be in the affirmative, then the statutes giving the right to the lien are of little practical benefit to the persons for whose protection they were enacted. It is true that the livery stable keeper might serve

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upon the owner daily notices of lien, and in that way only could possible loss be avoided; but a reasonable construction of the law does not require such an extraordinary proceeding to obtain the advantages promised by the statute (*Eckhard agt. Donohue*, 9 *Daly*, 214).

In the case cited, where the owner brought an action of replevin against the livery stable keeper for wrongful detention of a horse, it appeared that the notice of lien was not served until after demand of the animal and refusal to deliver. It was held that the livery stable keeper had a reasonable time, after the demand, to make up the account of his charges and serve it with the statutory notice. If this decision be correct, it ought to cover the case now under consideration, for it holds, in effect, that the service of the statutory notice of lien relates back so as to make lawful a refusal to deliver, which refusal, without a lien to sustain it, would certainly be unlawful against the owner as well as against a purchaser.

The reason given by the court was, that, the statute being remedial, a construction must be given it which would aid its enforcement; that as its provisions require not only notice, but an account of the charges where the account ran over a period of several months, and the livery stable keeper might not be prepared on the instant of demand to hand the debtor the bill of charges and notice, it would be in the power of the latter, if unscrupulous, to cut off the lien altogether by a sudden demand. In like manner it would be in the power of an unscrupulous debtor, by a sale of the animals, to cut off the lien, unless, after demand by the purchaser, the keeper had a reasonable time to serve his notice and bill of charges, and I think we are bound to construe the statute so as to secure in every case, and under all circumstances, where innocent third parties will not suffer, the benefit of the law to persons it was intended to protect. See cases under the act giving a lien to boarding-house keepers, in *Misch agt. O'Hara* (9 *Daly*, 361).

The purchasers will not suffer by holding, in this case, that after their demand and notice of purchase, the stable keeper

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had a reasonable time in which to perfect his lien. The horses were in his stable, and that is all the notice of lien which, in any case, a third party can have. No record is made of the lien, as is suggested by chief justice MCADAM, in *Ogle agt. King* (City Court, July, 1884), and the possession of the animals by the stable keeper is constructive notice of the right to the lien.

The decision of the supreme court, in *Jackson agt. Kasseall* (30 Hun, 230), does not conflict with this view. It was held there that the rights of a mortgagee having a chattel mortgage on the horses were superior to the lien of a livery stable keeper, but the facts of the case show that the charges for keep, which were the subject of the lien, were not incurred until after the mortgage was given; that, in fact, the stable keeper boarded a horse which was already subject to a mortgage lien.

There was no estoppel in this case, because the plaintiffs had paid for the horses before they notified the defendant of the sale. The failure of defendant then to assert his lien, did not injure nor affect the plaintiffs (*Graham agt. Fitzgerald*, 4 Daly, 178).

The order should be affirmed, and judgment in favor of defendant entered upon the stipulation, with costs.

LARREMORE, C. J., and VAN HOESEN, J., concur.

COURT OF APPEALS.

SATTERLY agt. WINNE.

Highways—Private road—Description in order laying out—What is substantially a compliance with the statute—When order defective—Discretion of Commissioners.

The statute governing the laying of a private road is substantially complied with where in the application the general course is given as easterly or westerly, &c., and the exact course and distance can be determined from other particulars in the application, or by natural monuments referred to.

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therein; the statute does not require that the courses shall be specified in the application by degrees and minutes.

The order laying out such road is fatally defective when it does not follow the description in the application, but differs essentially from it, unless the description in the application is deemed to be incorporated into the order.

Commissioners of highways in laying out a private road have no discretion as to where they will lay it, but must lay it out as described in the application.

Decided January, 1886.

John E. Van Etter for appellant, Robert Winne.

William Lounsbury, for respondent, Andrew Satterly.

ANDREWS, J.—The question in this case turns upon the validity of the proceedings taken in 1877 to lay out a private road over the lands of the plaintiff and Samuel L. Satterly. If the road was legally laid out where the jury in fact intended to lay it out, and where it was staked out by the commissioners, the *locus in quo* of the alleged trespass was within the boundaries of the road, and the action cannot be maintained. The act of 1853 (*chap. 174, sec. 1*) prescribes that an application for a private road shall be made in writing, "specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which the road is proposed to be laid out." The application in this case was in writing, for the laying out of a private road, of the width of one and a half rods, beginning at a pair of *bars* at the westerly terminus of a road known as the "'Winne road,' on the easterly side of the old Kingston and Delaware turnpike road, and which now leads from the corner, in the town of Shandaken," &c., "and which said Winne road leads from said road to a place called 'Dunderbark,' and running from thence (said bars) in an easterly course along the bed of said Winne road to the foot of a short hill near a small apple tree, about 120 yards; thence leaving the old bed of said Winne road and continuing in an easterly course along the north side of the said

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hill about 200 yards, and there again striking the bed of said Winne road, near a thicket of hemlock and laurels, on the north side of the road; thence in a northerly course along the bed of said Winne road to the lands of Samuel L. Satterly about eighty rods; thence continuing in a northerly course along the bed of said Winne road, over the lands of said Samuel L. Satterly, to the lands of William Satterly, about eighty rods, and which said proposed road is wholly in the said town of Woodstock (Ulster county), and runs through the lands of Andrew Satterly and Samuel L. Satterly."

It will be noticed that the application describes the proposed road as being in the town of Woodstock, county of Ulster, and the width, courses, distances, and the *termini*; and further describes it as following the bed of the old Winne road, except for the distance of about 200 yards on the second course. The Winne road was a way across the lands of the plaintiff and his brother, Samuel L. Satterly, which had been used for sixteen or eighteen years by the defendant and others. It was plainly marked on the ground by such user, but had never been legally laid out; and its use by the defendant had been by the license of the owners of the land only. The descriptions in the application of the *termini* of the proposed road are indefinite, except as they are made definite by the reference to the Winne road. The point of commencement is the "bars," and the point of termination the "lands of William Satterly." But where the "bars" were located, and at what precise point upon the lands of William Satterly the road was to terminate, is made definite by the reference to the Winne road, provided that road itself is such a definite monument as may be referred to to make certain the indefiniteness of the description in other respects. The center line of the old road-bed must be intended to be the line described in the application (*People agt. Commissioners*, 13 *Wend.*, 310). The location of this center line will determine the exact *termini* of the proposed road.

It was held in *People agt. Commissioners, &c.* (37 *N. Y.*, 360),

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that a description of a proposed highway by reference to an established highway was a sufficient description by "metes and bounds," under the general highway act. It is true that the description of public highways is usually matter of public record, although this is not always the case; and what the fact was in this respect, in the case cited, does not appear. A private way by permission, not a matter of record, is a less certain monument than a recorded highway. But where such a way has been used for a great number of years, so that it has come to be called a road, there is little chance of uncertainty, and a description in an application by reference to such road gives substantial certainty to the description. The statute must, doubtless, be substantially complied with; but exact and technical accuracy in proceedings for the laying out of a private road, conducted, as they usually are, by persons not lawyers, cannot be expected. Few private roads would bear the test of a scrutiny which required a verbal and literal conformity to the words of the statute. We think the application did specify with sufficient distinctness the *termini* of the proposed road.

The course and distance of each line are stated in the application. The courses are not given by the compass, and the distances are approximate; but these are also made certain by reference to the Winne road, except where, on the second course, the proposed road leaves the Winne road for the distance of about 200 yards. But natural monuments—the apple tree, the hill, and the thickets of hemlock and laurel—mark the divergence and the point where the old road-bed again becomes the line of the new road. The statute does not require that the courses shall be specified by the compass in degrees and minutes; and, where the general course is given in the application as easterly or westerly, &c., and where the exact course and distance can be determined from other particulars in the application, or by natural monuments referred to therein, the statute is substantially complied with. We are of opinion, therefore, that the application conformed to the statute, and gave jurisdiction to the commissioners to call a jury, and

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authorized the jury to act upon the application. It is undisputed that the jury, before making their determination, proceeded, in presence of the commissioners, to view the premises; that the proposed road was staked out; and that the damages were assessed for the land within the boundaries so designated on the ground.

The most serious objection in the case arises upon the order of the commissioners laying out and describing the road after the jury had found that it was necessary and had assessed the damages. The order in describing the road does not follow the description in the application. It describes the road as beginning at the bars, &c., "and then running an easterly course of 988 feet, and then a north-east course 760 feet, and thence bearing a little more east 309 feet; thence bearing more north 252 feet," and so on. It is indefinite, and except that it refers to the application and declares that the commissioners had ordered that the road be laid out *pursuant to the application*, according to a survey made by them, would be incurably defective. The first course given in the order, running 988 feet, embraces the first two courses in the application. The distance by measurement of the first two lines, as given in the application, is about 1,000 feet.

The inference from the description in the order, unaided by the application, would be that the first course of 988 feet was a straight line, whereas in fact there is a bend in the road, as described in the application, before reaching the termination of the second course, and a straight line from the bars to the termination of the second course would leave the *locus in quo* outside the road. But if the description in the application is deemed to be incorporated into the order, the two descriptions can be substantially reconciled. It would then appear that the distance of 988 feet was not a straight line, and so as to the other discrepancies and uncertainties in the lines specified in the order. We are of opinion that the description in the application is the controlling one, and determines the actual *locus* of the way. In laying out a private road, if the jury find in favor

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of laying out the road, the commissioners are bound to lay it out as described in the application, and have no discretion either to refuse to lay out the road or to change its location, or to depart in any respect from the road proposed by the applicants. They have no power to decide anything, but perform simply the ministerial functions prescribed in the twelfth section of the act of 1853. That section is as follows:

"The commissioners shall annex to such verdict [of the jury] the application mentioned in the first section of this act, and hand the same to the town clerk, who shall file the same; and the commissioner or commissioners shall lay out and make a record of said road, as described in the petition of the applicant."

It is true that the road certified by the jury does not become a legal private road until the commissioners have performed the duty imposed by this section. That the verdict and application were duly filed is not questioned. The order declares that it was laid out pursuant to the application. The description in the order does not follow the language in the application. But this we conceive cannot be essential, provided the description in the application is incorporated into the order by reference, and the two descriptions are not irreconcilably repugnant.

While, on the one hand, we recognize the importance of the rule that proceedings *in invitum* to divest an owner of his property ought to be carefully watched so that no injustice be done, on the other hand, we cannot fail to recognize the importance of the public policy, sanctioned by constitutional provision, which requires that facilities be furnished for private ways, so that the property of citizens may be made accessible. This policy will be best promoted by a fair and reasonable, instead of a strained, construction of the statute authorizing the laying out of a private road; and we are of opinion that there was no defect which invalidated the proceedings in this case.

The point that the road ran across the land of one Evans, who was not named in the application or notified, and whose damages were not assessed, is not supported by the evidence taken in this proceeding, and the point was not raised on the

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trial. If the question was before us it would, we think, admit of great doubt whether the plaintiff could allege a defect or omission in the proceedings affecting the right of a third person with whom he was not in privity, and who raises no question, and, so far as appears, makes no complaint.

We think the complaint was properly dismissed at the circuit, and that the order of the general term should be reversed and judgment entered for the defendant.

SUPREME COURT.

MARY J. ADSIT, appellant, agt. THOMAS V. HALL, respondent.

Code of Civil Procedure, sections 66-1296—Attorney's lien—To what extent and how enforced—Appeal—Right of a plaintiff to stop the litigation after an adverse judgment upon the merits, is subject to the attorney's lien for his costs.

Section 66 of the Code of Civil Procedure now gives an attorney a lien upon his client's cause of action, both before and after judgment in favor of the client, and at all intermediate stages of the cause of action. The lien is given upon the cause of action, and such lien attaches to any verdict, report, decision or judgment in his client's favor. The lien being upon the cause of action, must continue until a judgment is rendered in the action which is final, either for want of power to appeal or for failure to appeal in time, by which judgment it shall have been determined there was no cause of action, and so nothing to support a lien.

A client has not an absolute right to stop the litigation after a judgment upon the merits has passed against the cause of action; but the right of a plaintiff to stop the litigation after an adverse judgment upon the merits, is subject to the attorney's lien for his costs and the attorney's approval.

- The attorney has the right, at his own expense, to bring and prosecute an appeal from a judgment against his client, and against the wishes of such client, in order that the attorney may, if successful upon the appeal, obtain a new trial and a favorable judgment, and a chance of collecting his costs from the opposite side by means of such judgment.

Special Term, February, 1884.

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THIS is a motion made by the plaintiff and appellant to stay the further prosecution of an appeal to the general term, from the judgment rendered in favor of the defendant and respondent at special term.

S. Brown, attorney for the motion.

U. G. & C. R. Paris, opposed.

POTTER, J. — This motion is somewhat extraordinary. From the original affidavits used upon this motion and copies of affidavits used upon a motion made by defendant to dismiss the appeal herein, it would appear that the plaintiff, by the Messrs. Paris, as her attorneys, commenced this action. That the same was tried at special term in September, 1882, and was decided in August, 1883, and judgment upon the merits entered for defendant in October, 1883. That after the decision and before the entry of the judgment the plaintiff wrote Messrs. Paris, her attorneys in the action, that she would not appeal, but would let the matter rest as the justice had decided it. This letter was received by the plaintiff's attorneys, but nevertheless they brought an appeal on or about the 9th day of November, 1883. One of the defendant's attorneys had been shown by the plaintiff her letter to her attorneys before sending it; that no case had been served upon defendant, and the time to make and serve a case had expired in November or December, and plaintiff's attorneys applied, upon notice, for leave to make and serve a case. This application was opposed by defendant upon the ground that plaintiff did not wish to prosecute the appeal. The affidavit of the plaintiff to the effect that she did wish the appeal prosecuted, and explaining her letter of September to her attorneys, was read upon that motion. The motion to make and serve a case was granted, without prejudice to a motion to dismiss the appeal.

At the succeeding January general term the defendant moved to dismiss the appeal upon an affidavit of plaintiff stating she did not wish the appeal prosecuted, made subsequent to the

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motion for opportunity to serve a case, and explaining her letter and her affidavit read upon that motion. This motion was denied, upon the ground that defendant, by his attorneys, had no standing to make such a motion. The plaintiff now makes this application upon her own affidavit and by an attorney selected by her for that purpose.

In opposition to the motion are read affidavits of Mr. Noyes, his wife and daughter, to the effect that in November or December previous, and when the application for leave to serve a case was pending, the plaintiff desired to have the appeal prosecuted, and desired Mr. Noyes to write plaintiff's attorneys in relation to the same, and that Mr. Noyes should see to the matter for her.

The affidavit of plaintiff to the effect that the appeal was brought without her authority and was being prosecuted by her attorney against her wishes, was made January 29, 1884. There is nothing in the way of acts or declarations by the plaintiff since that date showing that she has any wish to have the appeal prosecuted, and it would perhaps have been prudent to look to that affidavit alone for the evidence of her wishes in relation to the appeal, and to have held it conclusive in that regard.

But for greater certainty, I directed, by order, the appointment of a referee who should take her answer to certain questions specified in the order, and that the referee should take her sworn answers to those questions at a time and place where neither the attorneys or counsel in this case, or any persons, should be present, and where there should be no opportunity to influence her answers.

That course has been pursued, and the plaintiff has answered under oath that she wishes to have her attorneys restrained from prosecuting this appeal, and that they are not authorized to bring the appeal, and that she refuses to have the appeal prosecuted, and that she is content with the judgment.

I must conclude, at least, that she does not wish the appeal

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prosecuted in her name, and desires to have its further prosecution stayed.

It appears from the affidavits upon the motion that plaintiff's attorneys have not been paid anything for their services or their disbursements in this action, and that aside from her wardrobe, the plaintiff has no property except what is involved in this litigation, and that the interest or stipulated sum which she receives from the defendant, under the agreement which was sought to be modified or set aside in this action, is insufficient to meet her ordinary expenses and pay her debts.

It does not appear from the papers before me upon this motion, that the plaintiff's attorneys have ever presented any bill for their services or demanded payment for them, or that plaintiff has refused or offered to pay for the services, or that the amount of the bill or payment for services has ever been mentioned between the plaintiff and her attorneys at any time. There is no evidence of any settlement between plaintiff and defendant, and not sufficient evidence of any understanding or arrangement between them that the judgment should not be appealed from for the purpose or with the intent of affecting the costs of plaintiff's attorneys or their rights or lien as to costs.

Upon this state of facts this contention arises: First, whether the client has an absolute right to stop the litigation after a judgment upon the merits has passed against the cause of action, or whether the right of a plaintiff to stop the litigation after an adverse judgment upon the merits is subject to the attorney's lien for his costs and the attorney's approval; or, to put the question in another form, has the attorney the right to bring and prosecute an appeal from a judgment against his client against the wishes and at the expense of the client, in order that the attorney may, if successful upon the appeal, obtain a new trial and a favorable judgment, and a chance of collecting his costs of the opposite side by means of such judgment.

Prior to the statute of 1879 (sec. 66), the attorney had no lien

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for his costs upon his client's cause of action. But after the attorney had recovered a judgment in favor of his client, the attorney had a lien upon the judgment for his costs. The court, however, would, where there was no lien, protect its attorney against a collusive settlement between the parties for the purpose of depriving the attorney of his costs.

To prevent such a result, the court would allow the attorney to proceed with the action and obtain a judgment against the defendant if the plaintiff had a good cause of action against him.

In case judgment had been recovered, and thus a lien had been created in favor of the attorney for costs, the court would allow the attorney to wield the judgment against the defendant for the purpose of collecting his costs if judgment had been paid or released after notice of the lien between the parties for purpose of depriving the attorney of his costs (*Caughlin agt. N. Y. C. and H. R. R. Co.*, 71 N. Y., 443).

The general rule is, no doubt, that a party having a cause of action or a judgment, has a right to settle or dispose of it like other property, but nevertheless subject to the right and liens of others after notice of the same. The controversies usually arose between the attorney of the one side and the opposite side, but I can perceive no difference in the application of the principle involved, which is the protection of the attorney, whether he seeks protection from the acts of the opposite side, or of both sides, or of his own client. The controversy in this case arises between the plaintiff and her attorney. She desires not to appeal from the judgment against her, and her attorney asserts their right to have her appeal to protect their lien upon her cause of action.

Section 66 of the Code of Civil Procedure now gives an attorney a lien upon his client's cause of action both before and after judgment in favor of the client and at all intermediate stages of the cause of action.

It will be observed from the language of this section that the

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lien is given upon the cause of action, and that such lien attaches to any verdict, report, decision or judgment in his client's favor. The lien is not in terms upon the judgment.

This lien being upon the cause of action, it seems to me, must continue until a judgment is rendered in the action which is final, either for want of power to appeal or for failure to appeal in time, by which judgment it shall have been determined there was no cause of action, and so nothing to support a lien.

It seems to me unreasonable to hold that the lien ceases when a judgment has been rendered against the cause of action until such judgment becomes final; for such judgment may be reversed and the cause of action be established in favor of the plaintiff by another judgment.

If the first, and perhaps erroneous, judgment destroyed the lien, thereafter there could be no lien, for the statute provides that the commencement of the action shall create the lien, and not the reversal of a judgment, or any subsequent stage or condition of the action.

The logical sequence of holding the lien ceases by the first adverse judgment would be, that plaintiff's attorney would have no lien for his services, although the court should finally decide the plaintiff had a good cause of action, and his attorney had removed an erroneous judgment to have the cause of action established.

My conclusion is, that plaintiff's attorneys have a lien until it is finally determined there is not, and was not, at the time of the commencement of the action, a cause of action.

The next question is, whether the plaintiff's attorneys have the right to compel the plaintiff to prosecute, at her expense, the appeal brought by them, to determine whether the plaintiff has a cause of action, and to render their lien thereon available to them.

The statute has given the attorney a lien upon his client's cause of action, upon which the attorney has commenced an action. It is not perceived why this lien is, or should be, any different from any other lien which one man may give another

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upon any article of tangible property, or the lien which a party, by contract, may give his attorney upon the cause of action for his services.

In either case is the right or lien anything more than a *simple* lien? Does it involve or imply, without an agreement to that effect, any obligation upon the part of the party giving the lien, to prosecute the same at the expense of such party, or to allow the attorney to prosecute the lien in the name and at the expense of such party?

This species of lien, like any other lien, I apprehend, would be satisfied by the payment, or tender of payment, of the money it was given or intended to secure. But, until satisfied, it is a valuable and beneficial right of the attorney, and of which the courts should not permit its officers, who have, in good faith, expended their talents, time and money, to be deprived any sooner or differently than they would others not officers of the court.

Their rights, while not any more sacred than the rights of such others, are not less sacred. Every claimant of a right should be permitted by the court to resort to any remedy most available for that purpose, and consistent with the power of the court and in accordance with its rules and protection.

What remedy has the plaintiff's attorneys to make their lien available under the circumstances of this case? As we have seen, a judgment has been rendered upon the merits against the plaintiff's cause of action. While that judgment remains the plaintiff has no cause of action, and her attorneys practically have, by the judgment, lost the benefit of their lien.

The plaintiff is not disposed to appeal, but is content with the judgment. But her attorneys, who have a lien upon the cause of action for what the plaintiff owes them, and which lien may be the only means by which they can secure payment of the debts, are not contented with the judgment. They wish to remove the judgment as an obstacle in the way of enforcing the lien. An appeal has been brought, and is pending, by

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means of which plaintiff's attorneys profess they will be able to remove the judgment and make their lien available.

The plaintiff does not deny that she owes the debt, but makes no offer or effort to pay it. Why should she refuse to allow her attorneys to prosecute the cause of action she professed to have against the defendant, at their own expense, to secure the debt she owes them, but has not the means or the disposition to pay them?

If the plaintiff's attorneys are right or sincere in thinking that the judgment, as an obstacle to their lien, can be removed, or if they prefer to resort to that mode to obtain payment of their debt rather than to bring an action directly against the plaintiff for the debt, why should they not be allowed to do so by prosecuting such appeal at their own expense, and assuring the plaintiff against all risk of costs to the defendant upon the appeal? Such a course seems to me to be manifest equity.

The plaintiff had or professed to have a cause of action against the defendant. She brought an action and retained attorneys to establish such cause of action. By so doing and by operation of law the attorneys acquired a lien or interest in such cause of action, and from the commencement of the action the plaintiff and her attorneys had an interest in that cause of action. The plaintiff may sacrifice or abandon the interest that she has in the cause of action, but she may not sacrifice or prejudice the interest which her attorneys have in it. Such right with corresponding remedy is plainly recognized, if not provided for, in section 1206 Code of Civil Procedure.

The plaintiff applies to the court, therefore, for a favor, and not an absolute right, under these circumstances. It should not be granted without protecting the rights of her attorneys, which are involved with her rights.

I think the proper order to be granted upon this motion would be substantially this, viz.: That the appeal herein be dismissed upon plaintiff paying or securing to pay plaintiff's attorneys for their services in this action down to the time when the judgment herein was entered, or in case the attorneys herein

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signify a willingness to abandon and release their lien, and to resort to plaintiff's personal liability for such services within a reasonable time; but in case the plaintiff does not pay or secure to pay, and the attorneys do not signify an election to abandon their lien and to resort to plaintiff's personal liability for their services, it should be ordered that plaintiff's attorneys be allowed to prosecute said appeal at their own expense, and upon furnishing the plaintiff with security, to be approved by a judge of this court, against the payment of any costs of the appeal that may be awarded to the defendants, or any liability therefor.

SUPREME COURT.

THE PEOPLE *ex rel.* BENJAMIN EVANS agt. MARY LETSON *et al.*

Landlord and tenant—Summary proceedings—Code of Civil Procedure, section 2100-2265—Writ of prohibition—Where justice has jurisdiction, writ will not lie.

Where a petition in summary proceedings presents such a case as the officer can consider, a writ of prohibition will not lie.

Where L. presented a petition to a justice of the peace, praying for the removal of a tenant from certain premises under the provisions of the Code of Civil Procedure, concerning summary proceedings to recover possession of real estate, and the justice issued a warrant which was served upon the tenant, and on the return day he appeared and filed an answer denying each and every *material* allegation, and also set up new matter, going to the question of title; the petitioner demurred to the answer that it contained no defense, which demurrer was sustained, and a final order granted awarding possession to petitioner, and directing the issuing of a warrant, which was issued and delivered to the sheriff:

Held, that a writ of prohibition would not lie:

Held, further, that the question in the case really is, whether the justice erred in sustaining the demurrer of the petitioner to the answer of the relator. That question cannot be determined by writ of prohibition. It can be by appeal, and, in a proper case, there is a remedy by injunction.

Oneida Special Term, March, 1886.

People *ex rel.* Evans agt. Letson *et al.*

HEARING upon an alternative writ of prohibition.

J. A. Steele & J. J. Duddleston, for relator.

H. F. & J. Coupe, for defendants.

MERWIN, J.—It appears from the papers on which this alternative writ was granted, that Mary Letson, on the 1st of March, 1886, presented a petition to the defendant, Sherman, a justice of the peace of the town of Schuyler, praying for the removal of the relator from certain premises in that town, under the provisions of the Code, concerning summary proceedings to recover the possession of real estate. The justice issued a precept which was served on the relator on the 9th of March, and was returnable on the 13th of March. On the return day the relator appeared and filed an answer, by which he “denies each and every *material* allegation in said petition contained,” and also sets up new matter going to the question of title. Thereupon the petitioner, Letson, orally demurred to the answer that it contained no defense, which demurrer was sustained, and a final order granted determining that the relator held over after the expiration of his term, and awarding possession to the petitioner and directing the issuing of a warrant. A warrant was accordingly issued and delivered to a constable, who is made a defendant herein, and afterwards delivered to the sheriff, who is also made a party defendant herein.

The position of the relator is, in substance, that the justice in granting the final order, without trying the issue made by the general denial, exceeded his jurisdiction, and that, therefore, it is a proper case for a writ of prohibition.

The justice having granted his final order before the application for the writ, and issued the warrant, the proceeding now is, in effect, an application to stay the execution of the warrant. It has been held that a writ of prohibition does not lie to a ministerial officer, to stay the execution of process in his hands (*People agt. Supervisors of Queens*, 1 Hill, 200; *Ex parte Brandlacht*, 2 id., 367), and that this rule is not affected by the pro-

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visions of section 2100 of Code. That the tribunal proceeded against may be directed to cancel or vacate proceedings theretofore taken in the matter (*People agt. Commissioners of Excise*, 61 *How.*, 514). In *United States agt. Hoffman* (4 *Wall.*, 158), it is laid down that the writ of prohibition can only be used to prevent the doing of some act which is about to be done, and can never be used as a remedy for acts already completed.

It looks at least doubtful whether the relator can invoke this remedy at the present stage of the summary proceedings. But there is another question to be considered, and that is whether under section 2265 the relator is not precluded from this remedy. No fault is found with the petition presented to the justice. The latter had apparently full jurisdiction of the parties and the subject-matter. Did he lose it by his error, if it was one, in sustaining the demurrer of the petitioner to the answer of the relator?

In *People ex rel. Brown agt. McAdam* (2 *Civ. Pro. Rep.*, 52), it is said that when a petition in summary proceedings presents such a case as the officer can consider, a writ of prohibition will not lie. To the same effect are *People agt. Parker* (1 *Civ. Pro.*, 444), and *People agt. Steenburg* (9 *Alb. Law J.*, 411). In *People agt. Russell* (49 *Barb.*, 351), it was held that the fact that the tenant has a good defense to the proceedings will not entitle him to a writ of prohibition to restrain the magistrate from entertaining the proceedings, although it be plain that the magistrate cannot, in conformity to law, decide with the landlord. The magistrate is not thereby deprived of jurisdiction.

Section 2265 provides that when a petition is presented as prescribed in that title, the subsequent proceedings thereupon shall not be stayed or impeded by any court or judge, except in one of two methods, neither of which is by writ of prohibition. That section assumes that a case is presented by the petition that in accordance with the prior provisions of the title will give the magistrate jurisdiction. If it does not, then there may be a remedy in some other way than the two named. But if it does, then the statute is imperative. There being no ques-

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tion here about the jurisdiction of the justice on the start, the inhibition of the section applies.

The question in the case really is, whether the justice erred in sustaining the demurrer of the petitioner to the answer of the relator. That question cannot be determined by writ of prohibition (7 *Wend.*, 518). It can be by appeal, and in a proper case (*Knox agt. McDonald*, 25 *Hun*, 268) there is a remedy by injunction.

I am, therefore, of the opinion that it is not a case for a writ of prohibition, and that the proceedings must be dismissed, with costs, as upon motion.

CITY COURT OF NEW YORK.

JAMES O'DONNELL agt. GEORGE V. HECKER *et al.*

Judgment—On remittitur—Practice as to judgments absolute where the damages are unliquidated—Assessment should be had at trial term—Code of Civil Procedure, sections 1214, 1215, 1183, 8194.

The action is for negligence, and the trial judge dismissed the complaint.

Upon appeal the general term of the city court reversed the judgment and ordered a new trial. The defendants thereupon appealed to the court of common pleas, giving a stipulation for judgment absolute. The common pleas affirmed the order of the city court, general term, and gave "judgment absolute" in favor of the plaintiff:

Held, that as the damages were unliquidated, the assessment thereof must be had at the trial term before a jury.

Sections 1214 and 1215 of the Code apply only to applications for judgment by default, and even in those cases the "writ of inquiry" may be executed at trial term if so directed.

Special Term, April, 1886.

MCADAM, C. J.—The action is for injuries received by reason of defendants' negligence. Upon the trial the complaint was dismissed. The plaintiff appealed and a new trial was ordered by the general term. The defendants thereupon ap-

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pealed to the common pleas, giving the usual stipulation for judgment absolute. The common pleas affirmed the order and rendered judgment absolute in favor of the plaintiff. The plaintiff now applies for an order on the remittitur, and asks that it be settled according to the practice, whatever it may be. The damages, being unliquidated, must be assessed by a jury at the trial term of the court.

In case of judgment by default in an action for personal injuries, the damages must be ascertained by means of a "writ of inquiry" (*Code, sec. 1215*), but this does not require that the writ shall be executed by the sheriff, for it may be executed by the judge at circuit, without the presence of the sheriff (*Ellsworth agt. Thompson, 13 Wend., 658; Tillotson agt. Cheatham, 2 Johns., 107; Dillaye agt. Hart, 8 Abb. Pr., 394; Peck agt. Corning, 2 How. Pr., 84; Cazneau agt. Bryant, 6 Duer, 668; S. C., 4 Abb. Pr., 402; Hays agt. Berryman, 6 Bosw., 679; George agt. Fisk, 3 Robt., 710*).

In the present instance, an issue of fact was joined, which required trial at the circuit, and the provisions of the Code (*secs. 1214, 1215*) as to judgments by default for want of an answer do not apply. The general term of the city court ordered a new trial to be had at the trial term. This order has been affirmed by the common pleas, and still has legal effect, except that the "judgment absolute" awarded by the common pleas on the defendant's stipulation leaves the traversable allegations of the complaint admitted on the record. This is the legal consequence of the order for judgment absolute (*Thompson agt. Lumley, 7 Daly, 74*), so that the trial judge in form directs judgment on the pleadings, and orders the jury which he empanels to assess the damages (*Code, sec. 1183*).

The proceedings have been remanded to this court (*Code, sec. 3194*), that it may complete the trial, which the dismissal of the complaint cut short, and the assessment in this case should, as in *Thompson agt. Lumley (supra)*, be had at the trial term. This is the usual practice on judgments absolute, where the damages

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are unliquidated and an assessment becomes necessary to carry the judgment of the appellate court into effect. Sections 1214, 1215 of the Code, as before remarked, apply only to cases where the "plaintiff" is required to apply to the court for judgment as "by default" for want of an answer (2 *Tillinghast & Sherman's Pr.*, 250-261), and even in those cases the "writ of inquiry" may be executed (if so directed) at trial term.

The order submitted has been settled in accordance with these views.

SURROGATE'S COURT.

In the Estate of JAMES GRIFFITHS HENRY.

Appeal—Orders of surrogate when not appealable—Code of Civil Procedure, sections 2570, 2584, 1810—when perfected appeal does not operate as a stay in surrogate's court.

The surrogate having directed, in a case where one's right to be a party to a probate controversy was in dispute, that that issue should be inquired into and determined before the taking of any testimony in the matter of the factum of the will, a motion was made that a trial of all the issues proceed simultaneously.

Held, that an order denying such motion was not appealable.

Held, further, that a perfected appeal from an order denying a motion for taking by commission testimony without the state, though it concerned a "substantial right," within the meaning of section 2570 of the Code of Civil Procedure, did not operate as a stay of the trial of the probate controversy before the surrogate.

New York County, March, 1886.

ROLLINS, S. — The procedure relating to appeals from decrees and orders of this court is established by chapter 18, title 2, article 4 of the Code. Section 2570 provides that an appeal may be taken from any decree or from any order "affecting a substantial right." It is declared by section 2584 that, except as otherwise expressly prescribed, "a perfected appeal has the

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effect, as a stay of proceedings to enforce the decree or order appealed from, prescribed in section 1310, with respect to a perfected appeal from a judgment." By operation of section 1310 such an appeal affects a stay of all proceedings to enforce a judgment or order appealed from, "except that the court or judge from whose determination the appeal is taken may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal."

Now, I do not think that, by force of the statute just quoted, the appeals which have been taken by Evan J. Henry from the two orders lately made by the surrogate, have operated to stay the trial of this probate controversy which is now reached regularly on the calendar. The order denying the motion for the union of the issues theretofore directed to be separately tried, cannot be held to involve a "substantial right" within the meaning of section 2570. It affects mere modes of procedure that are entirely within the control of the trial court (*Arthur agt. Griswold*, 60 N. Y., 148; *Whitney agt. Townsend*, 67 *id.*, 40; *Miller agt. Porter*, 17 *How. Pr.*, 526). The order denying the motion for the issuance of commissions is, doubtless, appealable (*Helme agt. N. Y. C. R. R. Co.*, 79 N. Y., 175; *Wallace agt. Am. Lin. Thread Co.*, 46 *How. Pr.*, 403), but in what manner and to what extent, if at all, is the appeal which has been taken effectual as a "stay," within the meaning of section 1310? If the surrogate had made an order granting the application for commissions, it is clear that a perfected appeal would have operated to prevent their issuance; but an appeal from an order denying such an application does not, it seems to me, have practical operations as a stay at all.

It has never been held, so far as I can ascertain, that an appeal, either from an order denying, or from an order granting a commission, accomplishes *per se* a suspension of the trial of the action or proceeding for the purposes of which the aid of the commission has been sought. The mischiefs that would result from such a practice can scarcely be overestimated. The court

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of original jurisdiction would lose all control of its calendar. It would be utterly powerless to compel the trial of a cause, if it suited the pleasure of any of the parties thereto, even on the most frivolous pretext, to move for the issuance of a commission, and to appeal from an order denying his motion. If such were the true state of the law, the fact would long since, I think, have been ascertained and promulgated. If the surrogate has erred in denying the contestant's application for the issuance of commissions, the error will be, in due time, corrected, and the order of denial reversed. Besides, in case the trial of the cause shall now be directed to proceed, the contestant can except to that direction, and avail himself of that exception by appeal, in the event that a decree shall be hereafter entered adverse to his interests. The trial must proceed.

UNITED STATES CIRCUIT COURT.

McGINNIS agt. FARRELLY *et al*

Special partnership—What is not a sufficient compliance with the statute as to contribution of capital.

The law of New Jersey provides that in case of a special partnership, the special partner shall, before the filing of the certificate, "contribute in actual cash payments a specific sum as capital to the common stock":
Held, that the delivery of a check payable at sight is not a compliance with the statute.

April, 1886.

J. H. Shields and William C. Beecher, for plaintiff.

Abbott & Fuller, for defendant, Farrelly.

WALLACE, *J.*—On the 26th day of February, 1883, the defendant Farrelly, with others, intending to form a limited partnership in which Farrelly was to be a special partner and

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the others general partners, executed a certificate in the form required by the laws of New Jersey, where the partnership business was to be carried on, which recited that the amount of capital contributed to the common stock by said Farrelly was the sum of \$2,500, and that the partnership was to commence on that day. Unless a limited partnership was formed pursuant to the statutes of New Jersey, the defendant Farrelly is liable to the plaintiff upon the demand in suit as a general partner. The question is whether the statutes of New Jersey was complied with.

The revised laws of New Jersey provide that such partnership may consist of one or more persons who shall be called general partners, and of one or more persons who shall be called special partners, and who "shall contribute in actual cash payments a specific sum as capital to the common stock;" that a certificate shall be signed by several persons, reciting, among other things, the amount of capital which shall have been contributed by the special partner; that this certificate be filed in the office of the county clerk, and that there shall be filed with the certificate an affidavit of a general partner stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock "have been actually and in good faith paid in cash." The laws also provide that if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all engagements thereof as general partners. February 26, 1883, the certificate was acknowledged according to law, and, together with an affidavit of one of the general partners, verified on that day in form according to statute, was filed in the office of the proper clerk. At this time Farrelly had not contributed any actual cash payment as capital, except by drawing his check for the sum of \$2,500 on a New York city bank and delivering it to one of the general partners. His check was good for the amount, he having at the time a large balance to his favor at the bank upon which it was drawn. The time when the check was delivered was after banking

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hours, and it was retained by the person to whom Farrelly delivered it until the 26th day of March thereafter. The check was not presented to the bank or used in the meantime, and on the 26th day of March was returned to Farrelly unpaid. Thereupon Farrelly drew a check for \$5,000 intended to cover the amount of the original check, and a loan to the partnership of \$2,500 in addition, which check was delivered to one of the firm, deposited to the credit of the firm and the firm received the avails thereof.

It must be held that no actual cash payment had been contributed by Farrelly to the partnership when the certificate was filed. Similar statutes authorizing the creation of limited partnerships exist in several of the states of the union, and have been the subject of judicial exposition. It is the well-settled doctrine that one who has not strictly complied with the requisitions of such statutes cannot claim exemption as a special partner from liability for the debts of the firm of which he is a member; and that his liability as a general partner is fixed if he has omitted to make his contribution to the capital of the firm in the mode required by the true construction of the statute. When the statute requires the contribution to be made in actual cash payments, nothing but money will satisfy its meaning.

In the case of *Haggerty agt. Forster* (103 Mass., 17), in speaking of such a statute, the court used this language: "The statute is plain and explicit. It requires payment to be made when a certificate is signed, acknowledged and recorded as the foundation of the partnership; and this certificate must recite what has been done, and not that which is executory. Its object is to provide a fund on the day the company is formed, to be thereafter subject to no contingencies or losses except those which come from the proper business of the partnership. The use of the phrase, 'actual cash payments,' is entitled to significance; it is wisely intended to exclude a construction by which commercial securities of any description short of cash may be regarded by the aid of mercantile usage or otherwise as sub-

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stantially equivalent to cash, and to remove from all parties the temptation to evade its requirements in this respect."

In *Durant agt. Abendroth* (69 N. Y., 148), where such a statute was under consideration by the court of appeals, the court said: "The statute peremptorily requires an affidavit that the capital has been actually paid in cash. * * * The object of this provision is to secure certainty and to prevent equivocal transactions in the formation of these partnerships. Nothing but cash satisfies its requirements. No engagement or security, however good, can be substituted even temporarily."

In *Van Ingen agt. Whitman* (62 N. Y., 513), it was held that a contribution in credits or in any other thing except cash, however convertible at the time into money, is not a compliance with the statute.

It would hardly be contended that the delivery of a check by the special partner, payable at a future day, would meet the requirements of the statute. It is urged, however, that the delivery of a check, payable at sight, is equivalent to an appropriation of a cash fund to the capital of the partnership, and is, therefore, a substantial compliance with the statute. If, instead of handing over the money, the special partner should deposit the amount of his contribution in a bank to the credit of the firm, or with a third person, so as to part with all control over it by himself exclusively and enable the general partners to appropriate it, it might well be urged that this would be a sufficient compliance with the statute. A sum may be deemed to be paid or contributed in cash when the money is placed within the absolute control of the person who is to receive it, although not within his manual custody. But where a check is drawn for the benefit of the payee upon a bank in which the drawer has a deposit, and is delivered to the payee, the latter does not acquire even an equitable lien upon the fund in bank. The relations between a banker and depositor to whose credit money is placed is the ordinary relation of debtor and creditor, and has been universally so regarded since the question was elaborately discussed and decided in the house of lords in the case of *Foley agt. Hill* (2 Clark & Finnelly, 28). It is equally well settled that an assignment of a part of a debt will not bind

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the creditor either in equity or at law, nor deprive him of the right to pay the whole to the assignor after notice that part has been transferred to the assignee (*Mandeville agt. Welsh*, 5 *Whed.*, 227; *Gibson agt. Cooke*, 20 *Pick.*, 15; *Hopkins agt. Beebe*, 2 *Casey*, 85; *Gibson agt. Finnley*, 2 *Md. Ch.*, 75), and because the right of the depositor against a bank is merely that of a creditor, and an assignment of part of the deposit is not an equitable assignment of any interest in the fund, a bill of exchange or check before acceptance does not operate as a transfer of the funds of the drawer in the hands of the drawee, nor create any lien thereon (*Chapman agt. White*, 6 *N. Y.*, 412).

The holder of a bank check cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer (*Bank of the Republic agt. Millard*, 10 *Wall*, 152; *First National Bank agt. Whitman*, 94 *U. S.*, 343).

A check is but an order on a depositary directing him to pay a certain sum to the payee or bearer. The drawer can intercept its payment at any time before actual payment or acceptance by the drawee. It does not furnish to the payee a fund which is subject to his exclusive control. It may be regarded by mercantile usage as equivalent to a cash payment; it may be convertible immediately into money; but its delivery to the general partners is not the payment in actual cash which is contemplated by the statute. No better illustration of the danger that would attend such a loose construction of the statute as would permit the terms "actual cash payment" to be fulfilled by the delivery of a check, payable at sight to the general partners, could be suggested than is shown by the facts of this case. Although the affidavit filed with the certificate stated that the contribution of the special partner had been actually and in good faith paid in cash, the money was not realized until a month subsequent to the filing of the affidavit. There may not have been any intentional bad faith in the transaction, but if it should be permitted to stand the purpose of the statute would be wholly frustrated.

Judgment is ordered for the plaintiff.

NEW YORK SUPERIOR COURT.

CHARLES BUERMANN and AUGUST BUERMANN, as executors of the will of August Buermann, deceased; AUGUST BUERMANN, as general guardian of Emma Buermann and William Buermann; CHARLES BERNHARDT, as general guardian of August Bernhardt and of Henry Bernhardt, agt. THE NEW YORK PRODUCE EXCHANGE; EVA BUERMANN, individually, and EVA BUERMANN, as executrix of the will of August Buermann, deceased.

Infants—Guardian—Actions in behalf of infants to recover personal property, should be brought in the name of the infants by a guardian ad litem—Code Civil Procedure, sections 469, 470, 476.

A general guardian cannot sue in his own name to recover any personal property of his ward. The action must be brought in the name of the infant by means of a guardian *ad litem*. Sections 468, 469, 470, 472, 474, 476.

Special Term, April, 1886.

THE complaint alleged that August Buermann died being a member of the New York Produce Exchange which had a gratuity fund of \$5,000, to be distributed to his widow and children on his death, but that in his life-time he had in his last will and testament given the fund solely to his children, his wife having executed a release of the same to him. The Produce Exchange refused to pay the money except one-half to the widow and one-half to the children or the general guardian of the minors. The two executors and the general guardians of the minor children thereupon joined in this action and sued the Produce Exchange and the widow individually and as executrix that the whole of the \$5,000 be paid to them, and the widow be compelled to execute a release to the exchange.

George F. Langbein, for the widow and executrix, demurred, among other grounds:

1. That the general guardians had no right or power to sue in their own names to recover the share of the money belonging to the infants.
2. That they had not legal capacity to sue.

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3. That no *guardian ad litem* had been appointed for the infants.

4. That the general guardians are improperly joined as parties with the other plaintiffs.

5. That there is a defect of parties in that the infants have not been made party plaintiffs by *guardian ad litem*.

He argued:

I. An infant can only sue by *guardian ad litem* regularly appointed on application to and order of the court.

The court may appoint the general guardian of the infant, the *guardian ad litem* in the action, but the general guardian cannot sue in his own name. This has always been the law, and is now the law more clearly since sections 468, 469, 470, 472, 474 and 476 of the Code of Civil Procedure.

1. Part 1, chapter 8, of the "domestic relations"; title 3, of "guardians and wards" (2 *R. S.*, 150 [3 *R. S.*, *Banks Bros.*, 6th ed., 167]), gave power to a father to appoint a guardian *by deed or will* who "may maintain all proper actions, &c., as a guardian in socage might (*see secs. 1, 2, 3*)

By section 10. When the father did not appoint the surrogate may do so.

2. Guardians in socage could only sue about lands of the infant under fourteen years of age (*Byrnes agt. Van Hoesen*, 5 *Johns.*, 66).

3. Part 3, chapter 8, title 2, "proceedings by and against infants" (*secs. 1, 2 and 3* [*Banks 6th ed.*], *R. S.*, 731, *original paging* 446), makes it plain that an infant must sue in his own name by a *guardian ad litem* who is competent and responsible.

He also cited, *Matter of Fritz* (2 *Paige*, 375, 376), *Grantman agt. Thrall* (19 *Abb. Pr.*, 212), *S. C.* (29 *How. Pr.*, 310), *Hoyt agt. Hilton* (2 *Edw. Ch.*, 202), where the chancellor would not allow the father of infants who had been appointed their general guardian to sue to recover legacies without being first appointed *guardian ad litem* (*Bradley agt. Amidon*, 10 *Paige*, 237; *a similar case*, *citing pages* 239, 243; 2 *Kent's Com.* [12 ed.], 228, 229).

It was early decided that an infant can only sue by *guardian ad litem* (*see Cro. Jac.*, 4; *Cro. Eliz.*, 424; 1 *Roll. Abr.*, 287, pl. 3, 2; *Saund.*, 212, n. 5).

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And so in any court (1807, *Mackey* agt. *Grey*, 2 *Johns.*, 192, *followed*; 1811, *Ackermann* agt. *Turell*, 8 *id.*, 418; 1823, *Bullard* agt. *Spoor*, 2 *Cow.*, 430; 1814, *Bradwell* agt. *Weeks*, 1 *Johns. Ch.*, 325; 1835, *Matter of Howes*, 2 *Edw. Ch.*, 484; 1848, *Hili* agt. *Thatcher*, 3 *How. Pr.*, 407; 1849, *Hurburt* agt. *Newell*, 4 *id.*, 93; 1850, *Litchfield* agt. *Burrell*, 5 *id.*, 345; 1855, *Hoftailing* agt. *Teal*, 11 *id.*, 188; 1858, *Croghan* agt. *Livingston*, 6 *Abb. Pr.*, 351, 352), where *real estate* of the infant is concerned, the action can only be brought by the guardian in socage, or the general guardian, and not by the infant (*Chappman* agt. *Tibbetts*, 33 *N. Y.*, 289; *Cagger* agt. *Lansing*, 64 *id.*, 417); and the objection in such case, as to the party plaintiff, must be taken by demurrer (*Seaton* agt. *Davis*, 1 *T. & C. Sup. Ct.*, 91; *see, also*, *Holmes* agt. *Seeley*, 17 *Wend.*, 78, and sec. 1686, *Code of Civ. Pro.*, and *Moore* agt. *Devoe*, 22 *Hun*, 208; *citing, also*, *secs. 115 and 116 in Howard's, Voorhies', and Wait's Old Code, and cases cited under each*).

II. The only case, apparently, in favor of the plaintiff is that of "*Edgar Thomas, General Guardian of Joel D. Thomas*, and *George Thomas* agt. *John C. Bennett* (56 *Barb.*, 197), which was brought in a justice's court by the general guardian in his own name, without the appointment of a guardian *ad litem*. The county court of Onondaga and the general term of that county, affirming the judgment April 7, 1868, FOSTER, MORGAN and MULLIN being the judges, and FOSTER, J., delivering the opinion of the court. The suit was about pension money to be paid by the United States government to the infants. Their general guardian employed the defendant to collect it for them, and he claimed he had forwarded it to them by mail. The plaintiff simply sued as guardian, and was allowed to amend by inserting the word "general" before the word "guardian." The defendant moved to dismiss the complaint on the ground the general guardian had no capacity to sue, and that a guardian *ad litem* must be appointed before the issuing of process, which was denied.

The only question raised on appeal was, whether the general guardian appointed by the surrogate could maintain the action in his own name as general guardian. The learned judge admits a guardian in socage could not sue about the personalty. He describes the powers of a testamentary guardian from Revised

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Statutes, part 2 (1 *R. S.*, 150, *sec.* 3), and those appointed by a surrogate, and argues that there is no reason why such guardians, having charge of the personalty, should not have the right to sue for it. He thinks the legislature intended, by the loose language, to give general guardians the same rights to sue about the personalty that testamentary guardians have to sue about the realty.

He then admits that a general guardian cannot bring a suit in his own name against personal representatives of an estate, to compel payment over to him of his ward's share, but he says that is because *the share* has not been ascertained; they must be called to account first. The learned judge's attention was not called to the cases of *Hoyt agt. Hilton* (2 *Ed. Ch.*, 202), or *Bradley agt. Amidon* (10 *Paige*, 237), or many others, where suits brought to recover the *shares* of infants were dismissed, because of the general guardian had no right to sue, and not because the shares had not been ascertained, or because the personal representatives cannot be reached in that way. The learned judge then says: Section 3 of 1 Revised Statutes 150, received judicial construction in *White agt. Parker* (8 *Barb.*, 52), entirely ignoring part 3, chapter 8, title 2, page 731 of the Revised Statutes, "*Proceedings by and against Infants*," as if not knowing such a statute law existed, and that the question was determined by it, and not by 1 Revised Statutes, section 3, page 150.

The learned judge also cites *Genet agt. Talmadge* (1 *Johns. Ch.*, 5), that the general guardian is entitled to the possession and care of the personalty. This is not disputed, but it gives him no right to sue for it, as of course. The infants are wards of the court.

The court has supervision over general guardians, and when there is a cause of action about the ward's property, the general guardian, or any other person, must apply to the court, and it will determine whether he is a proper person to be appointed to bring suit, and prosecute it, for its ward. The learned judge further said, "the powers and duties of guardians is analogous to executors." Be that so, the legislature has expressly given to executors the right to sue about the personalty; it has not done so with general guardians; on the contrary, it had always enacted special directions about suits in relation to infants' property.

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Part 3, chapter 8, titles 2, 3, Revised Statutes (5th ed., p. 745), original paging 446, 447, 3 Revised Statutes (6th ed., p. 731). Section 471 (*Old Code*) superseded part of the above, and the two sections in the fifth edition were supposed to remain unaffected.

In the sixth edition of the Revised Statutes, page 731, there are three sections, instead of two, as in the fifth edition. The two sections in the fifth edition are sections 1 and 3. Section 2 of the sixth edition is not in the fifth edition.

The learned judge also cites cases that committees of the estates of lunatics and habitual drunkards could sue in their own names, and reasons, therefore, general guardians can do so, his attention not being called to the fact that by Laws of 1845 (sec. 2, p. 95) these committees were specially authorized and empowered to do so. No statute or law, however, can be found that general guardians *ever* had such authority or power,; on the contrary, because there never was any, the court of chancery, the supreme court and all other courts, and the Codes of Procedure, have always required a guardian *ad litem* to be appointed about infants' rights and personal property, and it was not obligatory, but only discretionary, whether the general guardian was appointed guardian *ad litem* or not.

The rights and property of infants were never the rights and property of the general guardian. The latter is only entitled to the *possession* and *care* of the personalty, but the personalty and right are the property of, and belong to, the infant, and must be sued for in his own name and not in the name of the general guardian.

III. In *Segelken agt. Meyer* (14 Hun, 593), 2 Revised Statutes, 150, section 3, was again cited, and 2 Revised Statutes, 446, sections 1, 2 and 3 not alluded to. Judge GILBERT therefore, said, thinking a general guardian could sue as well as a guardian *ad litem*: "Such right of action rests upon his duty to take the control and management of the infant's personal estate." He continues, however: "The legal title to the moneys in controversy is vested in the infant, and his general guardian is merely his bailiff or trustee. As the moneys belong to the infant, I see no objection to the appointment of a guardian *ad litem* to sue for the recovery in a proper case," and then he cites *Thomas*

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agt. *Bennett* (56 *Barb.*, 197), saying: "The only question heretofore has been, whether the general guardian could maintain an action to recover debts due the infants, and although that question has been set at rest, the converse one respecting the right of the infant by guardian *ad litem*, to maintain such an action has not, to my knowledge, been authoritatively denied. The infant having a right to sue on the ground of his general property, it must be done by a guardian *ad litem* (*Code of Civ. Pro.*, *secs.* 468, 469), who may, in some cases, be appointed on the application of the general or testamentary guardian. Section 476 also recognizes an appointment of the general guardian as guardian *ad litem* (*Shoul Dom. Rel.*, 592, *et seq.*, and *authorities cited*)."

The same case is reported in 22 *Hun.*, 6, where the general term reiterates the action was properly brought in the name of the infant by guardian *ad litem*. It is also reported on appeal in 94 *N. Y.*, 473. The suit being brought by the guardian *ad litem*, the point was taken it ought to have been brought by the general guardian, the contract being in writing, made by the general guardian with the defendant (*see* 478) on page 77. *Thomas agt. Bennett* (56 *Barb.*, 197) is contrasted with *Bradley agt. Amidon* (10 *Paige*, 235, 239) in favor of the latter. The court unanimously say, the property is in the infant and possession in the general guardian, and that a suit brought in the name of the infant by guardian *ad litem* is not improper.

IV. See, also, *Abbott's Forms*, vol. 1, page 51, head-note to chapter 5 and page 52; also, *Abbott's Digest*, vol. 7, title "guardian *ad litem*," head-note thereto, and head-note to title, "guardian and ward," in same volume, *Hahn agt. Van Dovern* (1 *E. D. Smith*, 411), *Wood agt. Wood* (8 *Wend.*, 358).

V. 2 Revised Statutes, 150, part 2, chapter 8, title 3 (3 *R. S.* [6th ed., *Banks*], 167), was not repealed when the Civil Code of Procedure went into effect. Laws 1880, chapter 245, repeals all of title 3, except sections 1, 2, 3, 20 and 21. It repealed section 10, heretofore referred to. Section 3 is there still law.

2 Revised Statutes, 446, sections 1 to 3 (3 *Banks* [6th ed.], 731), being part 3, chapter 8, title 2, sections 1, 2, 3, have all been repealed by Laws 1880, chapter 245, and sections 468, 469, 472, 475 and 477 of the Code of Civil Procedure took their

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place, which make it quite plain where an infant has a right. "he" is entitled to maintain an action thereon, and a guardian for the infant plaintiff *must* be appointed. Section 470 of the Code of Civil Procedure, taking the place of section 116 of subdivision 1 of the Old Code, shows that if the infant *has* a general guardian still a guardian *ad litem* must be appointed on his application.

VI. The case of *McDonald* agt. *Brass Goods Manuf. Co.* (2 *Abb. N. C.*, 484), cited in the *Matter of Mang* (50 *Super. Ct.*, 96), shows the strictness and jealous regard of the court for the appointment of a proper person to conduct a suit for an infant as guardian *ad litem*.

Otto Meyer and *Frederick A. Card*, argued:

I. That by the by-laws of the New York Produce Exchange, in the case of infants, the money was payable to their general guardian and, therefore, should sue it.

II. He has the care and custody of the personal property of the infant, and must gather and collect it in; he is to receive it, and having a right to the care, custody, possession and control of the moneys he has the right to sue for it.

III. That *Thomas* agt. *Bennett* (56 *Barb.*, 197), had never been questioned, or reversed, and that *Segelken* agt. *Meyer* (14 *Hun*, 598), did not decide that a general guardian could not bring such action. It only held that a guardian *ad litem* could also do so.

O'GORMAN, J.—This action is brought by the general guardians of infants, to assert their claim against the New York Produce Exchange for \$5,000, which became due and payable by that association to the widow and next of kin of August Buermann, deceased, and against Eva Buermann, the widow, who demurs on the ground, among others, that the general guardians had no right or power to sue in their own names to recover this property belonging to the infants, and that suit could only be properly brought by a guardian *ad litem*.

The question raised by this demurrer has not been altogether free from doubt.

In *Segelken* agt. *Meyer* (94 *N. Y.*, 47), the court say, that it does not appear to have ever been decided by that court. It

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held, however, that that action was well brought in the name of the guardian *ad litem*.

The Code of Civil Procedure, which in sections 469, 470 and 476, requires that before a summons is issued in the name of an infant plaintiff, a competent person must be appointed to act as his guardian *ad litem*, and provides, also, that the general guardian may be appointed as guardian *ad litem*, sufficiently expresses the intent of the law as it now is, viz : That by the intervention of that officer alone, an action on behalf of an infant can be brought, at least, in cases where the assertion of the infant's claim to recover personal property is concerned.

The case of *Cagger agt. Lansing* (84 N. Y., 418), was decided before the adoption of the Code of Civil Procedure now in force. It was an action brought by the general guardian of infants to recover real estate, and it was held that their rights in such an action were enforceable by their mother as guardian in socage (*Id.*, 426).

The case at bar is concerned with the assertion of the claim of the infants, not to real estate, as to which alone a guardian in socage could have represented them in an action, but only to personalty, and the case last cited throws, therefore, no light on the present inquiry.

In my opinion the necessity of clear and uniform practice under the provisions of the Code of Civil Procedure above referred to, requires that the rule should be recognized, that in cases such as that at bar, the actions should always be brought in the name of a guardian *ad litem*, properly appointed, and that if brought in the name of the general guardian they are not well brought.

For these reasons this demurrer is sustained, with costs.

COURT OF APPEALS.

PHILIPS PHENIX, &c., respondent, agt. MARIA W. LIVINGSTON.

Executors and administrators—Commissions, when trustees—How computed.

Where executors are also trustees, they are entitled to commissions in both capacities, where the will contemplates a severance of duties, and a point

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of time at which those of the executor would be ended and those of the trustees begin, but where a portion of the trust estates consists of real property, the commissions should not be computed upon the value of the real estate subject to the trust, but only upon sums of money, or other equivalent, received and paid out. (*Wagstaff agt. Lowerre*, 28 Barb., 209, overruled.)

Decided March, 1886.

J. E. Kernochan, for appellant.

William B. Ross, for respondents.

FINCH, J.—There are but two questions in this case, and both may be considered without reviewing the complicated details of the trust accounts. These questions are whether the executors, who were also trustees, became entitled to commissions in both capacities, and if so, whether the trustees' commissions are to be computed upon the value of the real estate. The first of these questions must be answered by subjecting the facts established to the test of the rules adjudged in *Johnson agt. Lawrence* (95 N. Y., 154) and *Laytin agt. Davidson* (95 N. Y., 263). In the first of these cases double commissions were refused for the reason that the will contemplated no separation of duties on the part of the executors, and no transfer to or holding by them of any portion of the estate in the character of trustees; while in the second, double commissions were allowed upon the ground that the will did contemplate a severance of duties, and a point of time at which those of the executors would be ended and those of the trustees begin. In that case the severance of the trust funds from the general assets contemplated by the will had taken place; so much of the estate as was needed for debts, legacies and expenses had been to those purposes appropriated, and the balance, having been ascertained by a settlement of the executors' accounts, became and was adjudged to constitute a trust fund to be further held

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and managed as such. Within the doctrine of these cases, commissions in both capacities were properly allowed in this.

The will contemplated a severance of duties and a point of time when that severance should take place. At the beginning of the instrument, after directing the payment of debts and expenses, the testator names six persons "executors of and trustees under this my last will and testament." They were first to act as executors of the will and then as trustees under it. A series of separate trust estates are then constituted, running for the lives of specified beneficiaries. Some of them required specific sums to be set apart, and others and more important ones provided in very careful detail for a severance of purely trust estates from the general assets and their further management and administration, not by the executors, but by five out of the six of them holding as trustees. Since a serious portion of the trust estates consisted of real property, provision was made for a suitable partition for the purposes of the trusts, and a broad and abundant authority given for the management of the lands. The trustees were empowered to lease the improved property for a period not exceeding five years, and that which was unimproved for not more than twenty-one years. Authority was conferred to sell the lands in other states, the unimproved property in this state, and the dwelling house with the consent of the widow, and the trustees were authorized to rebuild structures destroyed or impaired and erect new buildings upon unimproved property so as to render it productive.

A further provision of the will is quite significant. The trustees are empowered in their discretion, through the agency of a revocable power of attorney, to commit the management of certain of the trust estates to the beneficiary, but preserving in themselves the title and resuming control wherever they should deem it advisable. It is impossible to reflect upon these provisions of the will without a resultant conviction that the testator contemplated and provided for two separate duties to be performed by his representatives; one as executors and the other as trustees; the latter to commence at the termination of the

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former; and to begin with a severance of the trust estates from the general assets and to be held and managed thereafter by his executors or some among them in the capacity of trustees. Such a severance was in fact made. The accounts of the executors as such were settled, and there was left nothing but the trust estates to be managed for the beneficiaries. Separate accounts were opened with each and they were held and managed for many years, with a great amount of labor, with a large demand upon the care and patience of the trustees, and with a very heavy burden of responsibility. We think it was a proper case for the allowance of commissions to the same persons, first in the character of executors and then in that of trustees.

The appellants, however, further insist that the commissions of the trustees should not be computed upon the value of the real estate, and the argument is that commissions are only given upon sums of money or their equivalent received and paid out; that the trustees never received the fee of the lands, since that fee vested at once in the grandchildren, the trustees taking only an estate commensurate with their trust, which simply terminated and was never transferred or paid over.

We think this objection is well founded, and that as it respects real estate held in trust the commissions of the trustees are not to be computed upon the value of the land which remains unsold.

The office of a trustee was at first deemed honorary and without compensation, but our statute changed the rule and allowed compensation to executors, administrators and guardians at a fixed percentage, to be computed upon all sums received and paid out. Trustees were not named specifically in the enactment, but they were held to be within the equity of the statute and entitled to compensation as if included within it. To that we must therefore refer, and by that be governed in determining what allowance, if any, is to be made. Sums received and paid out are made the basis of computation. It has, nevertheless, been held that securities received by an executor and by him turned over to the parties entitled might be treated as money

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received and paid out for the purpose of computing commissions. This was itself an extension of the authority of the statute, justified by the consideration that what was accepted as money by the parties interested might well be treated as such for the purposes of compensation.

But we are asked now to take a step further and give a new extension to the act which does violence to its language, and makes land, in no just sense received or transferred, constructively money. The only authority for this doctrine is the case of *Wagstaff* agt. *Lowerre* (23 Barb., 209), and a few cases in the supreme court and the surrogate's court in the city of New York, which have followed it as authority.

Wagstaff agt. *Lowerre* was a special term decision. It cited as authority but two cases, neither of which justified the conclusion reached. In one of them (*Matter of DePeyster*, 4 Sandf. Ch., 511), the court said, "there is force in the argument that there is no well grounded distinction between lands and stocks as to the trustee's compensation," but the remark was uncalled for, and unnecessary for the purposes of the decision. The lands there in question had been bid in upon foreclosure of mortgages belonging to the estate and in equity remained personalty and were therefore treated as such in the hands of the trustees.

The other case cited, *McWhorter* agt. *Benson* (Hop., 42), gives no indication that real estate was at all in question, and the elaborate opinion of the chancellor aims only to show that the statute had fixed a definite rate of compensation for an executor's services; a rate computed upon the sums of money received and paid out, and that an allowance of a gross sum was not permissible. *Wagstaff* agt. *Lowerre*, therefore, stood upon no existing authority, and it can have only the force derived from its reasoning.

In this court the question is an open one, and so far as we have been able to ascertain, has never been discussed and decided. We ought not to wander from the statute, and strain its construction to an extent approaching perilously near to legislation.

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In the present case the fee of the lands, it is conceded, vested in the grandchildren by force of the will at the date of the death of the testator. The estate of the trustees took priority, but only for the purposes of the trust (*Stevenson agt. Lesley*, 70 N. Y., 512). They were authorized to sell and to rent the real estate. Upon all sums of money thus realized and passing through their hands they were entitled to commissions; but the unsold lands, at the close of the trust, passed to the possession of the remaindermen, not through any title derived from the trustees, but by force of the original devise. The trustees transferred no land, but simply refrained from exercising their power of converting it into money. And so they not only never paid it out even constructively by any grant or conveyance, but never even received the absolute fee which all the time was a vested interest in remainder. Their estate was simply commensurate with their trust, bounded as to duration by the terms of the trust, and as to the unsold lands never equalling in value that of the fee. We must therefore adhere to the statutory basis of computation and decline to advance further in a construction which steadily departs from a plain and unambiguous enactment having a definite purpose and meaning. If hardship or injustice shall result, of which we are by no means certain, the remedy may be readily applied by further legislation.

So much of the judgment as allows commissions upon the value of the unsold lands should be reversed, without costs to either party.

All concur.

COURT OF APPEALS.

DENMAN and others agt. MCGUIRE, impleaded, etc.

Practice—Creditor's action—Fraudulent conveyance—Code of Remedial Justice
—Section 442—Affidavit.

Where an affidavit for an attachment was made April 21, 1877, and the warrant issued May 2d, and final judgment entered August 21st, the

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Code of Remedial Justice being in effect from May 1 to May 23, 1877, and the affidavit did not conform to the Code of Remedial Justice when presented to the judge, but was in strict conformity to the Code of Procedure, which was in force when the affidavit was drawn, and also when the judgment was entered:

Held that the effect of the statutes was that proceedings taken during said twenty-two days were valid if taken under either Code, so far as concerned an action previous to September 1, 1877.

It is sufficient to confer jurisdiction to grant an order of publication of summons, where the affidavit shows that efforts were made to serve it, and to ascertain defendant's place of residence, and that his residence and whereabouts were unknown.

Where the venue was placed in Sullivan county in the summons, and it was stated in the notice that the summons was issued by the county judge of Sullivan county, and was filed with the complaint, it was sufficient notice that the complaint was filed as required by Code of Remedial Justice, section 442, where it was questioned in a collateral proceeding, although it might be irregular in a direct proceeding.

Decided January, 1886.

Arthur C. Butts, for appellant.

T. F. Bush, for respondents.

EARL, J.—This action was brought by the plaintiffs, judgment creditors of defendant McCann, to set aside a conveyance of land situated in Sullivan county, made on the 15th day of October, 1874, by McCann to his son-in-law, the defendant McGuire, and to have their judgment declared a lien on such land. The plaintiffs attached the land and obtained a judgment against McCann, as a non-resident, by the service of summons by publication, and this action is based upon the judgment thus obtained. The affidavit for the attachment was made April 21, 1877, and the undertaking for the same was executed on the same day. The undertaking was approved, and warrant of attachment was issued on the second day of May. The complaint in the action against McCann was verified April 25th, and the summons in that action was dated May 3d. The

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order for the publication of the summons was granted May 8th, and the judgment was entered August 21st.

The Code of Remedial Justice, which was enacted in 1876, took effect May 1, 1877, and was in force until May 22d, when its operation was suspended until September 1, 1877, and the Code of Procedure was reinstated until that time. Upon the trial of this action the defendant assailed the attachment proceedings and the judgment for various irregularities and defects, and claimed that they were absolutely void for want of jurisdiction. As the merits of this controversy have been decided against McGuire, and he has been found guilty of co-operating with McCann to defraud his creditors, his technical objections to the proceedings against McCann, to which he was an entire stranger, should not be listened to with favor. In this collateral attack upon them those proceedings should be upheld, unless absolutely void for jurisdictional defects. There seems to have been singular carelessness and inattention in conducting the proceedings, and a court considering a motion made by McCann to set them aside might well hesitate to uphold them. But in this action they should be liberally construed for the purpose of upholding the judgment against McCann and the judgment now appealed from.

We will now notice some of the most material objections separately :

1. The attachment was obtained on the ground that McCann had assigned and disposed of his property and departed from the state with intent to defraud his creditors. It is objected that the affidavit made to procure the attachment did not sufficiently state the facts showing the fraudulent intent. While it is not so full as could be desired, yet we think there was enough to confer jurisdiction to issue the attachment.

2. It is objected that the affidavit did not state that the plaintiffs were entitled to recover the amount mentioned therein "over and above all counter-claims known to them," as required by section 636 of the Code of Remedial Justice. By section 3 of the suspending act (*chap. 318 of the Laws of 1877*) it was

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provided that any proceeding taken in conformity to the Code of Remedial Justice, during the twenty-two days of its existence, should not be impaired by the suspension, but that all subsequent proceedings in the action should conform to the Code of Procedure, and that the court should allow, without costs, any amendment or other proceeding necessary for that purpose. The affidavit was in strict conformity with the Code of Procedure, which was in force when it was made, but it did not conform, in the respect specified by the objection, to the Code of Remedial Justice when it was presented to the judge who granted the attachment. But while the operation of section 686, above referred to, was suspended, and the prior code was in force, the provisions of that section could not be invoked against an affidavit which conformed to that code. The affidavit conformed to the law in force when the judgment was entered in August, 1877. We think the effect of the statutes is that proceedings taken during the twenty-two days were valid, if taken under either code, at least so far as any action was based upon them prior to September 1, 1877, when the present code took effect.

3. It is objected that the affidavits upon which the order of publication was granted were insufficient to confer jurisdiction, in that they did not show that any effort had been made to serve the summons within this state, or that the plaintiff had used reasonable diligence to ascertain where the defendant would receive matter transmitted through the post-office. We think the affidavits sufficient in these respects. They show that efforts were made to serve the summons upon McCann, and to ascertain his place of residence, and that his residence and whereabouts were unknown. The facts sworn to were sufficient to confer jurisdiction.

4. It is objected that the notice attached to the summons published did not state where the summons was filed, as required by the Code of Remedial Justice (*sec. 442*). The notice was not in the precise form prescribed by that section, but we must hold that it was in substantial compliance therewith. The

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summons and notice were attached, and the latter referred to the former. In the summons it was stated that the action was in the supreme court, and triable in Sullivan county, and the notice states that the order was issued by the special county judge of that county, and that the summons was filed with the complaint. As the complaint was required to be filed in the clerk's office of Sullivan county, we think there was sufficient notice that the summons was filed in the same place. This notice was so far deficient and irregular that it might have been held insufficient in a direct proceeding instituted by McCann to set aside the service of the summons and the subsequent proceedings had thereon; but we think it ought to be held sufficient as against a collateral attack by McGuire, a stranger to that judgment. It was not so defective that the court failed to acquire jurisdiction to give judgment.

5. Various other objections are made to the attachment proceedings and the mode of obtaining the judgment against McCann, but those objections simply point out irregularities, and do not present or raise any question of jurisdiction.

6. The exception to the charge of the judge, to which our attention is called, points out no error. The language of the judge was a fair commentary upon the case. He did not charge that it was, as a rule of law, incumbent upon the defendant to procure the evidence of McCann, and he laid down no rule of law in reference thereto. But he distinctly charged that the burden was upon the plaintiff to establish the fraud which they alleged.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

RUGER, C. J., RAPALLO and FINCH, JJ., concur; ANDREWS and DANFORTH, JJ., dissent; MILLER, J., absent.

Citizens' National Bank of Hornellsville agt. Vorhis.

SUPREME COURT.

THE CITIZENS' NATIONAL BANK OF HORNELLSVILLE, appellant, agt. ALBERT B. VORHIS, respondent

Arrest—When a second and third arrest may be had for the same cause of action.

In general there cannot be even a second arrest for the same cause of action, unless it is shown not to be vexatious.

The question whether or not it is vexatious is to be determined by the circumstances of each case.

There seems to be no reason why even a third arrest should not be permitted, if it clearly appears not to be resorted to for the purpose of vexing the defendant.

Circumstances under which a third order of arrest for the same cause of action was sustained.

Fifth Department, General Term, January, 1886.

Before SMITH, P. J., BRADLEY and BARKER, JJ.

APPEAL from order of Monroe special term vacating an order of arrest.

J. H. & C. W. Stevens, for appellant.

Benton & Paine, for respondent.

SMITH, P. J.—The order of arrest, vacated by the order appealed from, was issued in the last of three successive actions brought by the plaintiff against the defendant, for the same cause, and in each of which the defendant was arrested. In addition, the defendant was arrested upon a criminal warrant based upon a complaint made in behalf of the plaintiff, charging the defendant with the same fraudulent acts which were alleged as the cause of action in each of the civil suits. The defendant gave bail for his appearance at the criminal court, and he having appeared accordingly, and there having been no

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appearance on the part of the prosecution, he and his bail were discharged. The first two civil suits were discontinued at the request of the defendant.

The defendant contends that a third arrest for the same cause is vexatious, and that whether intentionally vexatious or not, the law will not permit it. In general, there cannot be even a second arrest for the same cause, unless it is shown not to be vexatious. The question whether or not it is vexatious, is to be determined by the circumstances of each case. There are many reported cases in which a second arrest has been held to be regular. Where A. having been arrested at the suit of B., gave him a draft for part of the demand, and agreed to settle the remainder in a few days; after which, the draft being dishonored, B. sued out a new writ against A. and arrested him again on the same affidavit; this was held to be regular (*Puckford agt. Maxwell*, 6 T. R., 52; see, also, *Bates agt. Barry*, 2 Wils., 381; *People agt. Tweed*, 5 Hun, 382-392; *S. C.*, affirmed, 63 N. Y., 202; *Mencei agt. Raudnitz*, 20 Hun, 343; *Ewart agt. Schwartz*, 48 N. Y. Super. Ct., 390). In all these cases, the sole inquiry was whether the second arrest was vexatious, and if not, it was upheld. No reason occurs to us why even a third arrest should not be permitted, if it clearly appears not to be resorted to for the purpose of vexing the defendant.

In the present case, it appears that the first suit was discontinued, at the earnest solicitation of the defendant, upon his paying \$2,150 towards the plaintiff's claim and costs and promising to pay the rest, and, as the plaintiff's attorney testifies without contradiction, upon the express understanding that "there should be no legal or moral obligation upon the bank not to arrest Vorhis again at any time."

The affidavits on the part of the plaintiff also state, and in this respect they do not appear to be controverted, that the defendant not only made no further payment, but declared that he would not pay more than \$2,000 for the notes (the balance due on them being over \$9,000), and that declaration being regarded as evidence that he did not intend to pay, the

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second suit was commenced and defendant was again arrested. While in charge of the sheriff he admitted that he had broken his promise, and urged that the action be discontinued and he released, saying that he had made arrangements with a relative in the west, from whom he could get the money to pay with, and that if the action was discontinued he would at once proceed to raise the money and pay the claim. As the result of that promise and solicitation the action was discontinued. The stipulation for discontinuance was dated the 19th of November, 1884. On the 10th of April, 1885, nothing more having been paid by the defendant, this action was commenced and the defendant was again arrested. The opposing affidavits also state that the failure to appear in the criminal case was owing to the fact that an arrangement made with the district attorney to notify the plaintiff's cashier when the case would be reached was not carried out. And that at the next session of the court the case was presented to the grand jury and the defendant was indicted and he gave bail.

It is apparent from these allegations, which so far as we have discovered are substantially uncontradicted, that the discontinuance of the first two actions and the arrests therein obtained were acts of lenity on the part of the plaintiff granted at the solicitation of the defendant, and to our minds the result of the evidence is that the successive arrests, so far from being employed to vex and harass the defendant, were resorted to in good faith for the sole purpose of enforcing the plaintiff's claim.

Some of the moving affidavits aver that the payment of \$2,150 was in full settlement of the plaintiff's claim. The statement is improbable, and the opposing affidavits show, satisfactorily, that it is not correct.

The point is made that the first suit was not discontinued when the second was commenced. It is true the formal order of discontinuance had not then been entered, but the papers justify the inference that the agreement to discontinue was in fact made, and the defendant was released from the arrest in the first action before the second was begun.

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The respondent's counsel refers to the fact that on discontinuing the second suit the plaintiff took from the defendant a release of all claims for damages by reason of the two arrests, and urges this as evidence that the motive of the plaintiff's officers in making the arrests was improper. Any inference of that nature seems to be effectually repelled by the statement in the affidavit of Mr. Orcutt, the plaintiff's attorney, that he took the release, of his own motion, without the knowledge of the plaintiff or its officers.

Our conclusion is that the order appealed from should be reversed, and the motion to vacate the order of arrest denied, with ten dollars costs and disbursements.

All concur. So ordered.

COURT OF APPEALS.

PEOPLE *ex rel.* MUNSELL agt. COURT OF OYER AND TERMINER.

Jury—Misconduct of juror—Contempt—Distinction between civil and criminal contempts—Code of Civil Procedure, sections 8-14, 2284, 2285; Penal Code, sections 143, 243, 344, 619, 635.

Where, during a criminal trial, a juryman went during a recess to the scene of the affray, without the permission of the court, for the purpose of acquainting himself with the locality and its surroundings, he is not guilty of a *criminal* contempt, for which he would be summarily punished by the court.

A civil contempt may go beyond the statutory enumeration, and draw in what was usual or permissible at common law, but criminal contempt is precisely defined and barred in by the statute.

Decided January, 1886.

De Lancey Nicoll, for appellant.

Ira Shafer, for respondent.

FINCH, J. — The occasion and results of proceedings for con-

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tempt furnish a clear and well defined line of division, separating them into two classes, which have become somewhat mingled and confused by the use of a fixed but ambiguous nomenclature (*In re Watson* 4 *Lans.*, 470). There may prove to be rare and exceptional cases which do not easily fall within either class, or some which so commingle the characteristics of both as to make their location doubtful and difficult, but in the main the division is exhaustive and clear. In one class are grouped cases whose occasion is an injury or wrong done to a party who is a suitor before the court, and has established a claim upon its protection, and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety, and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss, and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end, the benefit of the suitor in some act or omission compelled, which is essential to his particular rights of person or of property. This clearly appears from the mode of enforcing the suitor's remedy prescribed by the statute (*Code Civ. Pro.*, *secs.* 2284, 2285). A fine may be imposed to indemnify his actual loss. Where such is not shown the fine must not exceed his costs and expenses, and \$250 in addition thereto, and in both cases be paid over to the suitor. The imprisonment, where the act or duty can yet be performed, must end with the performance of the act and payment of the fine; but if the act or duty cannot be performed, then the imprisonment must not exceed six months and until the fine be paid. In this last provision there is a trace of the element of punishment, but it is for the violation of the private right of the party and to check similar violations in the future, and has no respect to public offenses or the vindication of public wrongs. The people may be such a party, but only when, like individuals, they are seeking a civil right or remedy which the miscon-

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duct complained of tends to defeat or impede; in other words, when they stand in the attitude of private suitors seeking to enforce their private rights. If, in this class of cases, there exist traces of a vindication of public authority, they are but faint and utterly lost in the characteristic, which is strongly predominant, of protection to private rights imperiled or indemnity for such rights defeated. These cases have been usually described as proceedings for the enforcement of civil remedies, and, more briefly, as civil contempts, and because the great volume of instances occur in the progress of civil actions; but they may also occur in criminal actions or proceedings, as we shall presently see, and constitute then what I imagine the learned counsel for the appellant had in his mind when he spoke of "*quasi* civil contempts." If we describe this first class of contempts as private contempts because their occasion and result is primarily and in the main the vindication of private rights, we shall avoid confusion or misapprehension.

The second class of contempts are those whose cause and result are a violation of the rights of the public, as represented by their constituted legal tribunals, and the punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant. In these cases, if a fine is imposed, its maximum is limited by a fixed general law, and not at all by the needs of individuals, and its proceeds, when collected, go into the public treasury, and not into the purse of an individual suitor. The fine is punishment rather than indemnity, and if imprisonment is added it is in the interest of public justice, and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily these contempts, in their origin and punishment, partake of the nature of crimes which are violations of public law, and end in the vindication of public justice, and hence are named "*criminal contempts*." As described in the statute, an element of willfulness or of evil intention enters into and characterizes them. They are a disturbance of the court, which interferes with its performance of duty as a judicial tribunal; willful disobedience

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to its lawful mandate; resistance to such mandate willfully offered; contumacious and unlawful refusal to be sworn as a witness or to answer a proper question; and publication of a false and grossly inaccurate report of its proceedings. These cases and their punishment are placed under the head of "general powers of the courts and their attributes," and they very evidently relate to public offenses tending to cast discredit upon the administration of public justice, and having no reference to the particular rights of suitors. But here, again, we find that they occur as well in civil as in criminal actions, and so, for convenience, we may speak of them, in view of the present classification, as public contempts, although the established legal nomenclature must remain unchanged.

We have, then, two distinct classes—private contempts and public contempts—with which we are to deal, for the purposes of this case. Both were known to and recognized by the common law, and the courts were held to possess an inherent power of punishing, by process of contempt, any disregard of their authority, both for the benefit of their suitors, and for the protection of their own order and dignity. Necessarily, the common-law power was very broad, and vested large discretion in the courts. These became, in some instances, both accuser and judge, and this was especially so where the contempt was of a public nature, and no private person stood as complainant and sufferer. When the Revised Statutes were enacted, an evident effort was made to codify the law of contempt, and bring it within definite and fixed rules (1 *R. S.*, 534, *sec.* 1; 278, *sec.* 10), and the effort plainly recognized the difference between the two classes. The first, or private contempts, were described as those "by which the rights or remedies of a party, in a cause or matter depending in such court, may be defeated, impaired, impeded, or prejudiced in the following cases." After a very careful and specific enumeration it was still recognized that, in the multitude of private rights, other and unnamed cases might occur, and to meet that emergency subdivision 8 was added, which retained the power, in "all other cases where attachments

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and proceedings as for contempts have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party." By this clause the common-law right as to private contempts was preserved outside of and beyond the statute enumeration, and this was deemed safe and prudent, because, in cases affecting only private rights, and of wrongs done merely to the suitor, the courts would be under little or no temptation to unduly strain or exercise their power. But the situation was entirely different as to public contempts. As to these, the court contemned was the court which adjudged and punished; and that, summarily and without the intervention of a jury. Here precise limitations were needed, and any shred or remnant of undefined common-law power was deemed dangerous, and so the legislature decreed that "every court of record shall have power to punish as for a criminal contempt persons guilty of either of the following acts, *and no others.*" Observe the difference in the two acts founded upon the inherent difference between the two classes. The private or civil contempt might go beyond the statutory enumeration, and draw in also what was usual or permissible at common law. But the public or criminal contempt was precisely defined and barred in by the statute enumeration. The phrase "and no others" implies that there were or might be other and non-enumerated offenses, answering the description or characteristics of public contempts, which, but for the statute, might be so deemed and punished; and all these it was affirmatively intended to shut out, at least until subsequent legislation should let them in. So that for the criminal contempt we may look only to the statute, while for the private or civil contempt we may resort, if need be, to the common law. These two statutes have been substantially copied into our Codes (*Code Civ. Pro.*, sec. 8, 14; *Penal Code*, sec. 143). Outside of the criminal contempts enumerated, there were very many offenses of that general character which could not be so punished, but were reached by making

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them misdemeanors, and giving the culprit a trial before a jury; and any omitted case not covered by one or the other of these remedies may be easily met by further legislation.

Other provisions of the Codes, to which we have been referred, may have been enacted without keeping this classification in view; but if some confuse none of them destroy it. By section 243 of the Code of Criminal Procedure a grand juror may be challenged as a minor, an alien, or insane, or as prejudiced and not impartial towards the party challenging; and by section 243 his attempt to serve is punishable as a contempt. It is not called a criminal or public contempt, and is not made such; but in its nature was evidently deemed an act which rather violated the private particular right of the party challenging, and so belonged, as it was left by the Code, in the class of private contempt occurring in a criminal action. By section 344 and those which follow, a prisoner may apply to remove his case from a court, in which the indictment is pending, and for that purpose may apply to a judge for a stay; but if the application is denied a further appeal to another judge is forbidden, and made punishable as a contempt. Here, again, the prohibited act respects primarily the private right of the accused, and is classed as a simple contempt, and not denominated criminal. But since it does also respect public justice, and there is no suitor to be indemnified, it hardly belongs where it is placed, and some consciousness of this is evidenced by the further provision of the section that it shall also be punished as a misdemeanor. Section 619 makes disobedience to a subpoena or refusal to be sworn or testify, a criminal contempt, and section 635 extends that to a conditional examination.

It seems to me thus entirely clear that an act which is not a private contempt, and is not enumerated among criminal contempts, is not a contempt at all, although it may be and very often is punishable as a misdemeanor. There is no difficulty about the statute (2 R. S. [Edm. ed.], p. 759, sec. 14), to which the learned district attorney refers us, as making all contempts in civil cases applicable to criminal trials. The class of private

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contempts are so applicable where they in fact occur. The statute in question accomplished nothing except to make the form and manner of proceeding adopted to punish contempts in civil cases apply to contempts on criminal trials so far as in their nature applicable. It did not change the definition of contempts, or destroy or confuse the statute classification (*People agt. Restell*, 3 *Hill*, 295). The extended application of the statute was intimated in *People agt. Hackley* (24 *N. Y.*, 78), but the essential characteristics of contempts were not confused or altered.

There remains to us the inquiry whether the act of the juror in this case was a contempt at all. It is conceded that it was not a criminal contempt, because not one of those enumerated in the statute. It certainly was not a private or civil contempt, for it invaded no right of an individual suitor before the court, and involved no question of duty or indemnity to an individual litigant. On a criminal trial a verdict of acquittal was rendered, which shocked the sense of justice and aroused the indignation of the learned trial judge. It then appeared that Munsell, one of the jurymen, had gone to the scene of the affray for the purpose of acquainting himself with the locality. It is not alleged that he obtained any information. For that act he was committed for a contempt. On the face of the order it is recited that he willfully disobeyed the command of the court. If that was true, there was a criminal contempt; but it is here conceded not to be true, and that no order of the court was disobeyed. Certainly this was not a private or civil contempt. It is said the people were a party, and their rights were invaded, and so were to be protected. But the people were the public, and their rights were the rights of public justice, and the offense, if one at all, was a public offense. The phrase "to protect the rights of any *such* party" means a party entitled to "civil remedies" in his action, and wielding the power of the court for his private and personal benefit. It is true that in every criminal action the people, as parties plaintiff, have rights to be cared for in its progress. But these rights are

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generally of a public character and respect the protection of society. As in private contempts there are traces of a vindication of public authority, so in public contempts there are vindications of private rights, but, as in the other instance, lost and overwhelmed in the predominating characteristics of the class. Upon a criminal trial there is often behind the people an individual complainant who has suffered in his rights of person or of property, and more or less interested in the prosecution; but he is not permitted to be a party. He must go elsewhere to redress his wrong, and it is not his right which is being enforced, but that of public justice, with a view to the public safety; and the logical result of this must needs be that, on a criminal trial, a disrespect to or defiance of the court, which does not injure the private right of the accused, and calls for no vindication on his behalf, is either a criminal contempt or a misdemeanor, or both, but cannot be a private or civil contempt.

The distinction between the two classes of contempts was observed very soon after the statutes were passed. In a civil action decided in 1831, which the appellant cites, a party broke open books sealed up in the master's office, which was a contempt at common law. The chancellor said: "Upon my first examination of the Revised Statutes I was inclined to think that the section which defines criminal contempts had deprived the court of the power of punishing the improper conduct;" and then he holds that it was a civil or private contempt, within subdivisions 2 and 8, because it was a case in which the rights of the adverse party were materially involved.

We need not determine whether this juror was guilty of any offense whatever; for, if we should assume that he was, for the sake of the argument, and that what he did was unlawful and prohibited, his act would have been a criminal contempt but for the statute bar. It would have invaded no private right—no right of a mere suitor seeking a personal remedy for a wrong done him—but would have struck at public justice, and the vigor and honesty of its administration—have been

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a disrespect to the court, and a defiance of the public law, causing to miscarry a public prosecution. It is very certain that the learned trial court so understood and so dealt with it. The punishment adjudged was precisely the maximum of that fixed for criminal contempts both as to the fine and the imprisonment. There was no trace of indemnity to the people as plaintiffs. Their costs and expenses were not ascertained or considered or sought to be reimbursed. Nothing was meant but punishment for a public offense, to be dealt with as such. The court said the extreme punishment permissible was inadequate, but should be imposed. But thirty days in jail and \$250 fine was not the limit if this was a civil or private contempt. In that case both might have been greater; and in imposing the penalty upon the juror the court described it as "punishment for his misconduct." If there was misconduct the act would have been a criminal contempt but for the prohibition lodged in the words "no others." Those words are meaningless in the theory of the prosecution; for, if the people are to be deemed like private suitors, and whenever their rights are infringed there may be a *quasi* civil contempt, and that punished, as was this juror, precisely as if guilty of a criminal contempt, the whole statute and its prohibition is a complete absurdity. The roads are open on both its flanks. We cannot so construe it. We think the general term were right in saying that the juror could not be punished for a contempt.

The order of the general term should be affirmed.

All concur, except MILLER, J., absent.

Hone agt. De Peyster.

SUPREME COURT.

JOHN HONE, as executor of the last will and testament of MARIA N. DE PEYSTER, deceased, agt. JOHN WATTS DE PEYSTER, individually and as executor of the last will and testament of FREDERIC DE PEYSTER, deceased.

Trust—Entries in the stub of testator's check book, which amount to a declaration of a trust.

In an action brought by plaintiff as executor of his mother, M. N. De P., against the defendant, as an individual and as executor of his father, F. De P., the second husband of plaintiff's mother, to recover various sums of money alleged to have been received by F. De P., during his wife's life-time, for and on account of his wife, and which moneys, or the rights thereto, were acquired by Mrs. De P. prior to the married woman acts of 1848 and subsequent years, and, at the trial, the check book of testator was introduced in evidence, the stubs of which contained the following entries, viz.: Under date of February 5, 1884, "Mrs. F. De Peyster, Mrs. F. G. Foster, Mr. John Hone, proceeds from sale of their portion of P. I. Co. bond and stock as per mem. on file, and including checks 2,474 and 2,475, \$16,733.83, note; Mrs. De P., \$5,511.11; Mrs. F., \$5,511.11; Mrs. Hone, \$5,511.11; check, 2,474, \$50; do, 2,475, \$150." Also entry made April 20, 1884, in check book, on the deposit side, as follows, viz.: "Mrs. De Peyster's legacy from Hone estate, \$6,000; interest from November 22 last, as per receipt in Hone's receipt book, \$172.66; total, \$6,172.66."

Held, that these entries indicate a declaration of trust.

The division by the testator of the money arising from the bond and stock of the Peru Iron Company, by which the amount was divided between the parties from whose interest it arose, and the widow, was, in effect, credited with her share, is a plain indication of the intention of the testator to hold such proceeds, not for the benefit of himself, but for the benefit of his widow. It was, substantially, placing himself in the situation and relation of a trustee as to these moneys, for the benefit of his wife:

Held, further, that the plaintiff, as executor of the estate of the widow, was entitled to recover those moneys, as funds held in trust for the testatrix by her husband. (DAVIS, P. † dissenting.)

First Department, General Term, October, 1884.

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Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from judgment entered on the report of a referee.

J. E. Ward and J. H. Crawford, for plaintiff, appellant.

G. H. Brewster and T. Hyslop, for defendant, respondent.

The case was tried by and before Mr. William B. Hornblower, as referee. At the close of the evidence a motion was made on the part of the defendant to dismiss the complaint, and, in disposing of that motion, the referee pronounced the following opinion:

This is a suit brought by the plaintiff, as executor of his mother, Maria A. De Peyster, against the defendant, as an individual and as executor of his father, Frederic De Peyster, the second husband of plaintiff's mother.

Maria A. Hone, plaintiff's mother, after the death of her first husband, John Hone, Jr., the father of plaintiff, married Frederic De Peyster. This marriage took place in New York city, November 14, 1839. Mrs. De Peyster died October 30, 1869, leaving a will, which was admitted to probate by the surrogate of this county on February 1, 1870. This will was executed September 30, 1859. By it she bequeathed and devised all her estate, real and personal, to her husband, Frederic De Peyster, during his life, and, upon his death, she bequeathed out her estate to her son, John Hone, the sum of \$10,000, and all the rest, residue and remainder of her estate, real and personal, she devised and bequeathed in equal shares to her son, John Hone, and her daughter, Emily, wife of Frederic G. Foster. The testatrix appointed her husband executor, and upon his death, her son, John Hone, the plaintiff, as his successor. Frederic De Peyster qualified and acted as executor under the will until his death, which took place August 17, 1882, whereupon letters testamentary were issued to plaintiff, as his successor, these letters being dated October 12, 1882. The defendant,

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J. Watts De Peyster, who is the son of Frederic De Peyster, was appointed executor by his father's will, and letters testamentary were issued to him, as executor of his father, on the 25th of August, 1882. Defendant is also devisee and legatee of large amounts of property under his father's will.

The complaint alleges that various sums of money were received by Frederic De Peyster, during his wife's life-time, for and on account of his wife, which sums were the proceeds of her property or estate, and which said Frederic De Peyster always, up to the death of his wife, "recognized and treated * * * as the property of his said wife and as constituting a part of her separate estate," and which sums, upon the death of said Frederic De Peyster, came into the hands of the defendant, who now has possession of the same. The complaint also alleges that certain shares of stock, bonds and other securities, the property of said Maria A. De Peyster, including six shares of stock in the Bowery Fire Insurance Company, which were her property at the time of her second marriage, are in the hands of the defendant; that defendant obtained them as executor of said Frederic De Peyster, who, during the life-time of said Maria A. De Peyster, "treated and recognized the same as constituting a part of the separate estate of his wife," and who obtained possession of them under her will. The complaint further alleges that the defendant holds various articles of personal property belonging to said Maria A. De Peyster's estate, and received by defendant as executor of said Frederic De Peyster, who, during his wife's life-time, "treated the same as constituting part of the separate estate of his said wife, and who received the same under said will of Maria A. De Peyster." The complaint avers that the sums of money, shares of stock and other property above referred to, "though held by said Frederic De Peyster in his possession, were in each case received, held and possessed by him in trust for the use and benefit of the said Maria A. De Peyster and as trustee for her."

The plaintiff demands judgment for the various sums of money referred to in the complaint, with interest thereon, and

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that defendant account for said six shares of Bowery Fire Insurance Company stock with the dividends received thereon previous to October 30, 1869, by said Frederic De Peyster, with interest thereon; and that defendant account for and pay over and transfer to plaintiff all property received by Frederic De Peyster under the said will of Maria A. De Peyster, and which has come into defendant's hands, or the value thereof, and for such further and other relief as may be proper.

The answer is substantially a general denial, except as to some of the allegations of the complaint, with regard to the wills, &c., which are expressly admitted.

It appears from the evidence on the trial that all of the moneys and property claimed by the plaintiff, except, perhaps, a silver tea-kettle, were moneys and property the rights of which were acquired by Mrs. De Peyster prior to the married woman's acts of 1848 and subsequent years.

The rights of a husband in his wife's property in this state prior to 1848 were governed by the rules of the common law as modified by the doctrines of courts of equity.

So far as chattels and tangible personal property were concerned, the husband's title was absolute. His wife's possession was his possession. The legal title was in him, with the absolute and unqualified right of disposal.

So far as the wife's rights in action were concerned, the common law rule was that they reverted to her, unless the husband reduced them to his own possession during her life-time, or unless he survived her, in which case the title passed to him by right of survivorship. If he died before his wife, without having reduced her rights in action to his possession, his claims and those of his representatives to such rights in action ceased, and the wife's title became absolute.

Courts of equity, however, recognized the right of a married woman to acquire a "sole and separate estate," both in chattels and rights in action, and they enforced such rights whenever property was transferred or conveyed for her "sole and sepa-

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rate use." They also held that a husband might waive his marital rights in his wife's property, and might transfer property to a third person for his "wife's sole and separate use," or might even constitute himself trustee for his wife, so that a court of equity would enforce his wife's right to her property as her "sole and separate estate."

Such being the law at the time Mr. and Mrs. De Peyster were married, and at the time when Mrs. De Peyster's rights to the property in question accrued, we must next consider what effect the married woman's acts had upon these rights.

The acts of 1848 and 1849 (*Laws of 1848, chap. 200; Laws of 1849, chap. 375*), provided that "the real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single woman, except so far as the same may be liable for the debts of the husband heretofore contracted;" and the act of 1849 provided for the transmutation of equitable separate estates to legal (*Wood agt. Wood, 83 N. Y., 575*).

Subsequent statutes have still further enlarged the wife's rights; but it is not necessary to consider them in this connection.

These statutes, of course, were not intended to affect vested rights, and if so intended they would have been clearly unconstitutional, as taking away property "without due process of law." So far, therefore, as any husband had a vested right or interest in his wife's property at the date of the act of 1848, that right was not and could not be taken away or impaired by the act. As to the wife's chattels and tangible property acquired prior to the act of 1848, and not held in trust "for her sole and separate use," the husband's title was absolute, and the act had no effect whatsoever upon that title. This does not seem to have ever been seriously disputed. But as to the wife's rights in action, not reduced to possession by the husband prior to the act of 1848, it was at one time contended, with much force, that the husband's rights were so far inchoate

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and contingent that the legislature could put an end to such rights without taking away any such vested interests as are within the constitutional protection. But the court of appeals held in *Westervelt agt. Gregg* (12 *N. Y.*, 202) that the legislature could not constitutionally take away the husband's rights in his wife's choses in action, any more than his rights in her chattels. In that case a legacy of \$5,000 had been given by her father to Mrs. Gregg, and in September, 1846, she and her husband instituted proceedings before the surrogate of New York for the executor to account and pay over to them the amount of the legacy. Proceedings were continued until September, 1849, when a decree was made declaring that there were moneys in the executor's hands sufficient to pay the legacy, and reserving the question whether it should be paid to Mrs. Gregg or her husband. In November, 1849, the surrogate made a decree in favor of the husband, and this decision was affirmed by the supreme court and by the court of appeals. It was held that at common law the husband was entitled to the choses in action of his wife, and had the right to reduce them to possession for his own use; that this was property in the justest sense of the term, deserving protection; and that the act of 1848, so far as it undertook to interfere with such rights, was unconstitutional.

In *Ryder agt. Hulse* (24 *N. Y.*, 372) the same question came *again* before the court of appeals. The plaintiff in that case claimed by right of survivorship as against his wife's legatee. The property in dispute was derived from three sources. First, money which the wife had at the time of her marriage, in 1831; second, money received from the estate of her mother prior to 1848; third, moneys received by the wife during coverture, for butter, poultry, calves, &c., which the wife raised from her husband's farm, but which were treated by him and by her as her private and individual property, and the proceeds of which she invested, with his knowledge and assent, in her own name. All of these moneys, at the time of her death, in 1856, were represented by promissory notes, running in her name, she having

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loaned the moneys to divers persons, taking their notes therefor. By her will she bequeathed these notes to the defendant. The defendant contended that the common law gave the husband no property in a chose in action of his wife, not collected or appropriated to his use in her life-time, and that after her death he could claim only as her administrator, and hence took subject to her right to dispose of the same by will. But the court held that "all the personal estate of a wife vests absolutely in her husband at the moment of marriage, and all she acquires during coverture immediately becomes his. This is just as true in respect to her choses in action as of any other species of her personal estate. With regard to the choses in action, she has only a contingent interest in those in which her husband has failed to reduce to possession, or assigned or disposed of in his life-time." At her death, he does not take her choses in action, as next of kin, or under any statute of distribution, "but the property is already vested in him." The court accordingly held that the right of a husband to his wife's rights in action, even though not reduced to his possession or appropriated to his own use during her life-time, was such a vested right that the legislature could not take it away.

See also, on this general subject as to the common law rights of a husband in his wife's *choses in action* by the way of survivorship, the recent case of *Olmstead agt. Keyes* (85 N. Y., 593).

It is very clear, therefore, that this case must be decided exactly as if the "married woman's act" had not been passed, except so far as Mrs. De Peyster may be shown to have possessed an equitable estate, which by the act of 1849 became a legal estate in some or all of the property in question. Unless, however, this be the case, and unless the acts and declarations of Mr. De Peyster had recognized this property, or some portion of it, as set apart for the "sole and separate use" of his wife, so that he had become her trustee, the acts of 1848 and 1849 had no effect whatever upon his marital rights, and his title and that of his representatives to her chattels and *choses in action* were and are unaffected thereby. Her chattels.

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acquired prior to the act of 1848 vested in him absolutely when acquired; her *choses in action* vested in him absolutely upon her death, even if not previously reduced to possession.

I proceed to inquire whether there is any evidence of any trust relation as to any of the property acquired prior to 1848.

The first transaction in the order in which the several matters are set forth in the complaint is the Peru Iron Company matter. It is averred that about February 4, 1846, Frederick De Peyster received from the Peru Iron Company, for and on account of his wife, the sum of five thousand four hundred and thirty-six dollars and forty-six cents (\$5,436.46), being her share in certain moneys due from said company to the estate of her late husband, John Hone, Jr.

Mr. Frederick De Peyster's check-book, covering the year 1846, was produced under a *subpœna duces tecum*, and an entry on the stub of the check-book, under date of February 5th, upon the deposit side of the account, was put in evidence by the plaintiff.

This entry reads:

Mrs. F. De Peyster, Mrs. F. G. Foster, Mr. John Hone:

Proceeds from sale of their portion of P. I. Co. bond

and stock, as per mem. on file, and including

checks 2,474 and 2,475 \$16,733 33

Note:

Mrs. De P. \$5,511 11

Mrs. F. 5,511 11

Mr. Hone. 5,511 11

\$16,533 33

Check 2,474 50 00

Check 2,475 150 00

\$16,733 33

This entry does not seem to me to indicate any declaration

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of trust. On the contrary, it would seem to be an appropriation to his own use of the moneys, and a reducing of them to his own possession. It was a deposit of them to his own account in the bank, where they became mingled with his own funds and entirely under his own control. The moneys belonging to the shares of Mr. Hone and Mrs. Foster would seem, by cross-references on the stubs of the check-book, to have been subsequently paid over to them; but, so far as appears, the share of Mrs. De Peyster was never paid over to her or to any one for her use, but remained in Mr. De Peyster's bank account, unless drawn out for his own use. I am constrained to conclude, as to these moneys, that there was no declaration of trust, but, on the contrary, an unequivocal reduction of them to his own possession by the husband. The name of Mrs. De Peyster, entered on the stub of the check-book, in my judgment merely indicates the source whence the money was derived. It certainly is not sufficient to establish a trust, especially when the deposit itself was directly antagonistic to the theory of a trust, being an appropriation of the funds to the depositor's own use, and a mingling of them with his own money. It must not be forgotten that in this appropriation of these funds of his wife, the husband was but exercising a clear and unquestionable legal right. The funds were his by virtue of the marital relation unless he chose to waive his title or neglected to reduce them to possession. No such presumptions or intendments will be made against him as would be made against a wrong-doer or any one who owed some duty to the person claiming to be *cestui que trust*.

The next transaction set forth in the complaint is, that on or about May 1, 1848, Frederic De Peyster received for and on account of his wife the sum of \$6,000, derived from the sale of No. 194 Hudson street in the city of New York, which premises had previously been bought in about January 31, 1840, by said Frederic De Peyster for and on account of said Maria De Peyster under a foreclosure sale of a mortgage for \$5,000, given by John McVicker to said Maria A. De Peyster prior to her marriage to Mr. De Peyster.

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The check-book of Mr. De Peyster for the period between April 30, 1846, and May 1, 1849, was not found or produced on the trial, and no evidence was offered by the plaintiff, except the recital in the deed from Mr. and Mrs. De Peyster, to show the receipt of this money by Mr. De Peyster or its disposition by him, and it is, therefore, unnecessary to further consider this transaction. There is no evidence of any trust as to this sum of money.

The next matter set forth in the complaint is to the effect that, about April 22, 1844, the executors of John Hone, plaintiff's grandfather, paid to said Frederic De Peyster, for and on account of his said wife, the sum of \$6,000, the amount of a legacy to Maria Hone, deceased, a daughter of said Maria A. De Peyster by her first husband.

It appears from the testimony that plaintiff's sister Maria died in 1833, at the age of ten years. Their grandfather, John Hone, had died in 1832, leaving a will and codicil, by which he gave to each of his grandchildren living at his death the sum of \$6,000, the same to be paid to each of them upon their respectively attaining the age of twenty-one years, or marrying. Maria Hone would have attained the age of twenty-one years, had she lived, in December, 1843. In April, 1844, the amount of her legacy was paid by the executor of the grandfather, and Mr. Frederic De Peyster received the amount with interest on or about April 22, 1844. It seems to have been supposed by all the parties that Mrs. Frederic De Peyster was entitled to the whole of this legacy as next of kin to her deceased daughter, although, by the statute of distribution, she was entitled only to one-third.

Mr. Frederick De Peyster's check-book shows an entry under date of April 20, 1844, on the deposit side, as follows:

Mrs. De Peyster, legacy from Hone estate.....	\$6,000 00
Interest from November 22 last, as per receipt in the Hone receipt book	172 66.
Total	\$6,172 66.

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This entry, for the reasons already stated in connection with the Peru Iron Company matter, I do not regard as evidencing a trust but rather the contrary, an appropriation of the fund to his own use.

The next matter in the complaint calling for examination, is as to the Bowery Fire Insurance Company stock.

At the time of her marriage to Mr. De Peyster, Mrs. De Peyster was the owner of six shares of the capital stock of the Bowery Fire Insurance Company. The certificate was in her name, and so remained up to the time of her death, and stands in her name now. But this fact did not indicate any intention on the part of her husband to treat it as her "sole and separate estate," in the equity sense of that phrase. It was, at most, merely refraining from exercising his marital right to reduce the stock to his own possession. Upon her death, the stock passed absolutely to him by right of survivorship. It is not shown that he did or said anything as to this stock, which indicated any intention to waive his marital rights. On the contrary, he always collected the dividends from the date of his marriage to the date of his wife's death, thereby asserting and exercising *pro tanto* his right to reduce the same to his possession. I do not find any evidence which would justify me in concluding that this stock was set apart as a trust, or became the "sole and separate estate" of Mrs. De Peyster, so as to cut off his common law rights as husband.

The only other allegations of the complaint remaining to be considered are to the effect that the defendant holds certain bonds, household furniture and other personal property, chattels and effects belonging to said Maria A. De Peyster's estate, and received by defendant as executor of said Frederic De Peyster.

The only evidence offered in support of these allegations relates to two silver water pitchers and trays, silver kettle and a Dresden china centre-piece.

As to the silver pitchers and trays there is no testimony except that of Mrs. Emott; plaintiff's daughter, who testified

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she was an inmate of her grandmother's family for about twenty years, from the time she was a little child until she was married in 1864. After her marriage she frequently saw her grandmother and occasionally visited her down to the time of her death. She heard the remark made in Mr. Frederic De Peyster's presence that these pitchers were Mrs. De Peyster's pitchers. She did not remember whether she had heard that remark made more than once. She did not know when the pitchers were purchased. This hardly comes up to the requisites of legal evidence as to title, and it certainly would not justify a finding by me that Mrs. Frederic De Peyster was the owner of these pitchers and trays, even if I am to assume that they were purchased after the married woman's act of 1848.

As to the Dresden china centre-piece, Mrs. Emott testifies that she knows that it was given by her father to her grandmother; but when asked how she knows, she answers that she "always heard so; my father said so." I do not understand that the learned counsel for the plaintiff contends that this is legal evidence of title, or that there is any legal evidence of title in the case as to this article.

As to the silver tea-kettle, Mrs. Emott testified that she heard the remark made in her grandfather's (Mr. De Peyster's) presence that Mr. Foster had given it to her grandmother (Mrs. De Peyster). She is sure of the fact that the remark was made in her grandfather's presence, though she does not remember by whom it was made. Mr. De Peyster did not contradict the remark. She does not know when this tea-kettle was given to her grandmother. She does not remember when she began to notice it. "I suppose as soon as I was old enough to go to the table." She was there more or less from the time she was two years old. It would appear, from another portion of her testimony, that she began to live with her grandmother in 1844, as she says she lived there for about twenty years before her marriage, and she was married in 1864.

This does not seem to me sufficient evidence on which to

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base a finding either that Mr. De Peyster recognized his wife's ownership of this article as part of her "sole and separate estate," or that it was given to Mrs. De Peyster after the married woman's act of 1849, so as to be hers under the statute. One or the other of these facts must be found in order to support a judgment for the plaintiff as to this article.

The learned counsel for the plaintiff contends with great force and earnestness that they have made out a case within the rule laid down in *Whiton agt. Snyder* (88 N. Y., 299). In that case it was held that there was no presumption that property in the wife's possession was obtained prior to the act of 1848, even though the marriage of the parties took place prior to that act, but, on the contrary, the property being in the wife's separate and individual possession, at a time when her absolute ownership was possible, the presumption is that she acquired the property since the act of 1848. It was also held that a wife's separate and personal possession of specific articles of personal property draws after it the presumption of ownership.

But in the case now under consideration the evidence tends to show that the articles in question, and especially the silver tea-kettle, were acquired prior to 1848, and there is no evidence that they were ever in the "separate and personal possession" of Mrs. De Peyster. On the contrary, they appear to have been part of the table ware and household furniture in use by husband and wife jointly. The court of appeals, in *Whiton agt. Snyder*, say that as to wearing apparel and ornaments, "their very character and use implies a personal gift, and a separate possession in which the husband does not share. * *

As to articles of a different character, such as furniture and household goods, adapted to the use of and used by the family generally and in their common possession, a different rule must prevail. Although specific articles may be spoken of as the wife's, or as got for her, the difficulty of establishing an executed gift by showing a delivery, or a separate and personal possession, remains. Such cases must stand on their facts, and can

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rarely be brought within the range of a presumption of separate ownership." Among the articles in dispute in that case were a carriage and a clock. As to these the court say: "We cannot assign either to the personal possession of the wife alone. They were for the common use of both, adapted to such use." And the court state that they would "have great doubt about these articles but for one fact in the case," viz., that defendant, on his examination before the surrogate, swore that these articles were the property of his deceased wife.

This case of *Whiton* agt. *Snyder* seems to me, therefore, an authority for the defendant when carefully examined and applied to the facts of the case.

It is further contended, however, by the learned counsel for the plaintiff, that Frederick De Peyster admitted his wife's title to the property referred to in the complaint, by assenting to and assisting in the drawing of her will, in which she made a bequest of \$10,000, and disposed of her property "real and personal." It appears that Mrs. De Peyster's will was drawn in September, 1859, by the late Mr. Edward H. Owen, of this city. It further appears that a bill was rendered to Mr. De Peyster for this service, and was paid by him. It is further conceded by counsel for the defendant, for the purposes of this motion, that Mrs. De Peyster had no other personal property than that referred to in the complaint, though she owned some real property in this city, a lot and dwelling-house in University place. In spite of the ingenious argument of counsel for the plaintiff, I am not satisfied that this is an admission of Mr. De Peyster's title to the personal property in question, especially as it is not shown and cannot be presumed that her husband knew the contents of the will. The mere fact of her making a will with his assent is not sufficient to show an admission on his part that she had personal property to bequeath, in the absence of knowledge of the contents of the will, since it is conceded that she had real property on which the will should operate, and he may very well have supposed that the will referred exclusively to that. But even if he had known the contents

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of the will, I do not think I could draw from that circumstance the inferences claimed to be deducible therefrom, in the absence of more direct and positive testimony as to the title of the property in dispute.

As all the property in controversy, so far as the evidence shows, was acquired prior to 1848, the wife could have no separate estate in it, except by her husband "divesting himself of the property and engaging to hold it as a trustee for her separate use," and this must be done "by a clear, irrevocable gift, either to some person as trustee, or by some clear and distinct act of his" (*Ryder agt. Hulse*, 24 N. Y., 379; *McLean agt. Longlands*, 5 Ves., 79; *Schouler on Husband and Wife*, sec. 192; 1 *Bishop on Law of Married Women*, sec. 731).

I find no evidence of any such act on the part of Mr. De Peyster, and am therefore constrained to hold, notwithstanding the able and ingenious argument and brief of the counsel for the plaintiff, that no title has been shown, either legal or equitable, in Mrs. De Peyster or her representatives. It becomes, therefore, unnecessary to consider the other questions presented by counsel for the defendant as to alleged defects in the proof necessary to show a cause of action against the defendant either individually or as executor.

The motion to compel plaintiff to elect between the cause of action against the defendant individually, and that against the defendant as executor, will be denied, and the complaint will be dismissed, with costs.

The plaintiff may submit requests to find on or before the 21st instant.

DANIELS, J.—The division by the testator of the money arising from the bond and stock of the Peru Iron Company, by which the amount was divided between the parties from whose interest it arose, and the widow was in effect credited with \$5,511, is a plain indication of the intention of the testator to hold such proceeds, not for the benefit of himself, but for the benefit of his widow.

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It was substantially placing himself in the situation and relation of a trustee as to these moneys, for the benefit of his wife, as well as to the other two shares for the benefit of the persons entitled to the other parts of the money. There was the same reason for believing that he intended to hold one-third of the proceeds for her, as there was that he intended to hold the other shares, as he did, for the benefit of the other persons, to whom two-thirds of the money was in fact paid by him.

The same observations are alike applicable to the sum of \$6,000, received on account of a legacy from the Hone estate, which had been bequeathed to her.

The plaintiff, as executor of the estate of the widow, was entitled to recover those moneys, as funds held in trust for the testatrix by her husband.

The judgment should be reversed and a new trial ordered.

I concur with DANIELS, J., JOHN R. BRADY.

DAVIS, P. J. (dissenting).—This opinion of the referee is elaborate and well considered, and *our* own careful examination of the case has constrained *us* to the conclusion that upon all the questions, both of equity and law, involved in the case, it is correct. We accept it, therefore, as an accurate disposition of the case, although we think, considering all its circumstances, it would have been as well not to have awarded costs to either party.

It seems to us manifest, from the evidence in the case, that both Mrs. and Mr. De Peyster in their life-time acted in reference to her property, which she had received from the estate of her former husband, as though it remained her own, and with the expectation or belief that the ultimate disposition made of it, by her will, would be valid and enforceable after the decease of both. But as she acquired and owned her personal estate prior to the act of 1848, and the other acts familiarly known as the married women's acts, it was not subject to the provisions of those acts, as is now well settled by the authorities cited by the learned referee; and the acts performed by Mr. De Peyster

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in reference to it and its management were such as at common law were sufficient to clothe him with the legal title, as husband, of all the personal estate reduced to possession, and with the title, by survivorship, of all not reduced to actual possession. Their misapprehension of their rights cannot be held to change or affect the legal title of Mr. De Peyster, both during her life and after her decease.

We think it our duty, under the circumstances, in affirming the judgment, to do so without costs of the appeal.

The judgment is accordingly affirmed, without costs.

COURT OF APPEALS.

HAMMOND agt. MORGAN.

Replevin—Code of Civil Procedure, sections 1780, 1781, 3328—*Requisites of a judgment in replevin*—Code of Civil Procedure, sections 968, 969, 971, 972, 1225—*Practice in action for specific performance*.

Where plaintiff brought an action asking for the return of, and damages for the retention of, certain valuable papers, and the case was tried as one of replevin, and the jury rendered a verdict for plaintiff, awarding him the title, and thereafter plaintiff obtained an *ex parte* order for judgment, and that defendant deliver the papers, and that costs be taxed, and on the same day plaintiff entered judgment for costs and afterwards the judge struck the costs from the judgment on the ground that it was an action in replevin. On appeal from an order made on a motion of defendant to set aside the order and judgment:

Held, that the proceedings were irregular, either as an action of replevin or in equity, to compel specific performance; that the judgment, and order for judgment, should be set aside, and the case stand as it was after the verdict was rendered; and if the court desire to hear it as an equitable action, it might do so.

Decided January, 1886.

A. J. Vanderpoel, for appellant, James Morgan.

Marshall P. Stafford, for respondent, Andrew H. Hammond.

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EARL, J. — The plaintiff in his complaint alleges that on the 13th day of May, 1882, he delivered to the defendant a certain written assignment, dated in the month of April of that year, and executed by the defendant and Jane Matthews, as executors of Mason J. Matthews, deceased, whereby they conveyed to him all the interest of the deceased in certain letters patent and licenses under an assignment of letters patent, and also all the interest in any claim which the defendant and Jane Matthews, either by themselves or as executors, or jointly with the defendant and John Nichol, had or might have against the Mechanical Organette Company of New York, or against any other parties, relating to or growing out of the manufacture and sale of mechanical musical instruments; that the assignment was delivered to the defendant, in trust, to be returned to the plaintiff, but that the defendant failed and refused to return the same, although due demand therefor was made; and, further, that in or about the month of March, 1882, a paper in the nature of a release was executed by the firm of Needham & Son to the plaintiff, whereby the plaintiff was wholly released from certain obligations, dues and contracts to and with the firm, of which release the defendant obtained possession, and still retained possession, without right thereto, and in violation of plaintiff's right to the possession thereof, although demand for delivery to the plaintiff had been made of defendant and refused; that the assignment and release were of great value to the plaintiff, and that the retention thereof by defendant had greatly damaged him; and judgment was prayed that the defendant be ordered to return the assignment and release and deliver them to the plaintiff, and that the plaintiff have such damage for the retention thereof as a reference for that purpose might show that the plaintiff had suffered, besides costs of the action.

The answer denied all the allegations of the complaint, except that the papers mentioned therein had been demanded by the plaintiff. The action was subsequently by the plaintiff put upon the special term calendar for trial, and was stricken therefrom

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on motion of defendant's attorney, on the ground that it was at law and not triable there. The plaintiff then noticed the action for trial at a jury term of the court, and it was brought to trial, and appears to have been tried as an action of replevin. The jury rendered "a verdict for the plaintiff, and found the title of the property in the plaintiff, and that he should have the return thereof." Four days after the rendition of the verdict the plaintiff applied to the judge who presided at the trial, *ex parte*, without any notice whatever to the defendant, and obtained from him an order which directed that the plaintiff have judgment against the defendant, ordering him to deliver forthwith to the plaintiff the two instruments mentioned in the complaint, and particularly described in the order, and that plaintiff have judgment against the defendant for costs, to be taxed, and that he have execution therefor. Thereupon, on the same day, without any notice to the defendant, the plaintiff entered judgment in pursuance of that order, wherein it was adjudged and decreed that the defendant deliver forthwith to the plaintiff the two instruments mentioned in the complaint, and that the plaintiff have judgment against the defendant for costs of the action, which had been adjusted at \$210.92, and that he have execution therefor. A motion was subsequently made by the defendant, among other things, to strike the costs from the judgment, before the same judge who tried the action, and he, seeming yet to treat the action as one in replevin, struck the costs from the judgment on the ground that the jury had not found any value to the property, nor any damages for the detention thereof, and that, therefore, there was no basis for allowance of costs, under subdivision 2 of section 3228 of the Code of Civil Procedure. The defendant subsequently, by permission of the court, made a motion to set aside the order and judgment as irregular and unauthorized, which motion was denied at the special term. He then appealed to the general term, and from affirmance there to this court.

From the form of the complaint it is not certain whether the action is at law to recover the possession of the written instru-

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ments mentioned in the complaint, or in equity to compel the defendant to specifically perform, by delivering the instruments to the plaintiff. It does not seem to be disputed that, if the action was one in replevin, the judgment is irregular, because it is not such as is prescribed in the Code. A judgment in replevin should award the property to the plaintiff, together with damages for its detention; and in case delivery of the property cannot be made, its value, as determined by the jury, in lieu thereof; and the judgment must be enforced by execution, and not by punishment for contempt (*Code, secs. 1730, 1731*). A judgment in replevin may undoubtedly be entered, although the jury has not assessed any damages or found the value of the property. In that case the judgment would simply award the property to the plaintiff, to be enforced by execution; and, if the return of the property could not be thus obtained, the judgment would be unavailing.

But here the property was not replevied, and it is not now claimed by the counsel for the respondent that the action is to be treated as one at law, for the recovery of chattels. If, on the other hand, this is to be treated as an action in equity, to compel specific performance on the part of the defendant, as now claimed on behalf of the plaintiff, then the judgment was wholly unauthorized, and the practice quite irregular. In that event, the case was properly noticed at the special term, and should there have been tried before the judge, without a jury, unless, at his instance, or upon the motion of one of the parties, some or all the issues were ordered to be tried before a jury, and for that purpose the questions to be answered by them should have been distinctly framed. In such case the issues are sent to a jury for the aid and information of the court. If the facts thus submitted to, and answered by, the jury, together with facts admitted by the pleadings, cover the whole case, so that no further facts need be proved for the information of the court, motion may at once be made for judgment. Upon such motion both parties have a right to be heard, and the court may

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order judgment upon the case as then made, or it may set aside the findings of the jury, or use some of them, and it may allow either party to give further evidence. So, if the motion for judgment be not at once made, it must be brought on upon motion, so that both parties may be heard. But if the findings of the jury, together with the facts admitted in the pleadings, do not cover the whole case, and other issues remain to be tried, or other facts requisite for equitable relief remain to be proved, then the case must be regularly brought to a hearing before the court, when the court may or may not adopt the findings of the jury, and other facts may be proved; and in such case the court must make findings of fact and law, to which exceptions may be taken by either party desiring to appeal. Such is the general scheme of practice prescribed by the Code, and in this case there was no semblance of compliance with it (*Code, secs. 968, 969, 971, 972, 1225*).

Here there was no order sending issues for trial to the jury, and no questions or issues were framed; no proof was subsequently taken before the court, and no notice was given to defendant's attorney of the application for the order and judgment. But if we assume that the verdict of the jury may stand, as no objection was made to the mode of trial, or to the verdict, then what did it determine? Simply that the plaintiff owned the instruments, and that the defendant wrongfully detained them. These findings, so far as they went, were ample for an action of replevin; but were they, without more, sufficient for the equitable relief awarded? The ordinary remedy of a party against one who has wrongfully converted and wrongfully detains his chattels or choses in action is by an action of trover or replevin; but in peculiar cases, where from the nature of the case or of the property detained neither of such actions will give proper or sufficient relief, an equitable action may be instituted for the specific delivery of the property, and judgment in such an action may be enforced by punishment for contempt. But, before the equitable relief can

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be granted, the facts conferring equity jurisdiction should be alleged, and must be proved (*Pom. Eq. Jur.*, secs. 177, 1402).

Here, after the rendition of the verdict, the court could have taken further proof, if necessary, and could thus, after hearing the parties, have given judgment based upon its findings of fact and law, including the findings of the jury. We think, therefore, that the order for judgment, and the judgment, should be set aside, and that the case will stand where it stood after the verdict; and, if the court shall then treat this as an equitable action, it may hear the parties; and, if further proof be offered or needed, can take it, and then render the proper judgment.

We do not determine whether this should be treated as an action at law or in equity. We leave such determination to the court below. All we now determine is that the order and judgment should not have been made without notice to and hearing of the defendant, and probably without further proof and findings of fact and law by the judge. The defendant did not have a remedy for the error or irregularity he complains of by an appeal from the order or judgment. His only remedy was by motion.

The orders of the general and special terms should be reversed, and the order and judgment should be vacated, and the case remitted to the special term of the court below for further action therein; and the defendant should have costs of the appeal to the general term and to this court, and ten dollars costs of motion.

All concur, except MILLER, J., absent.

Boyle agt. Lawton.

SUPREME COURT.

MARGARET BOYLE and others, respondents, agt. SABRA LAWTON
and others, appellants.

Costs — Action to recover damages for an alleged trespass upon lands — When plaintiffs entitled to costs on the ground that title to real estate was put in issue by the pleadings, although the recovery is but ten dollars — Complaint — Answer.

In an action for damages for an alleged trespass upon lands, where the plaintiffs were M. B., the widow of P. B., deceased, and four infant children, and heirs of deceased, who sued by guardian, the complaint alleged that the widow had a dower interest in the premises in question, and that the infants were owners of the premises as tenants in common, subject to the dower interest of the widow. It also alleged that all the plaintiffs were in possession of the premises at the time of the alleged trespasses. The answer contained a general denial of the allegations of the complaint, except as admitted, and alleges, for a further defense, that one of defendants was the lessee of certain premises in the same town as the premises claimed by the plaintiffs, and that the house mentioned in the complaint stood on the premises of the defendant, and that she removed it from her own premises, as she had a right to do.

Held, that the allegations thus referred to directly put in issue the title to the *locus in quo*, and entitled the plaintiffs to costs.

Not only does the complaint allege title in the infant plaintiffs, subject to the dower interest of the widow ; but the answer takes issue with that allegation, *first*, by denying it, and, *secondly*, by alleging title in the defendant as lessee of the soil on which the house stood, the removal of which was one of the trespasses alleged.

Fifth Department, General Term, January, 1886.

Before SMITH, P. J., BRADLEY and BARKER, JJ.

APPEAL from an order of the Cattaraugus special term denying defendants' motion to set aside the taxation and allowance of costs to the plaintiffs, and to tax and allow costs to the defendants.

Boyle agt. Lawton.

Johnson & Markham, for appellants.

Ansley & Davis, for respondents.

SMITH, P. J.—The action is to recover damages for an alleged trespass upon lands. The plaintiffs recovered a verdict of ten dollars. The plaintiffs claim to be entitled to costs on the ground that the title to real estate was put in issue by the pleadings, and that claim presents the only question in the case.

The plaintiffs are Margaret Boyle, the widow of Peter Boyle, deceased, and four infant children and heirs of said deceased, who sue by guardian. The complaint alleges that the widow has a dower interest in the premises in question and that the infant plaintiffs are the owners of said premises, as tenants in common, subject to the dower interest of the widow. It also alleges that all the plaintiffs were in possession of the premises at the time of the alleged trespasses. It further alleges that the defendants entered upon the said premises, with force and arms, and broke and tore down the fence around the same; pulled down and destroyed a certain house situate thereon; broke up and destroyed a large quantity of lumber, and destroyed the trees and shrubbery growing upon said premises, to plaintiffs' damage, &c. The answer contains a general denial of the allegations in the complaint, except as admitted, and alleges, for a further defense, that the defendant Sabra Lawton was the lessee of certain premises in the same town as the premises claimed by the plaintiffs, and that the house mentioned in the complaint stood on the premises of the defendant, and that she removed it from her own premises, as she had a right to do.

The allegations thus referred to very distinctly put in issue the title to the *locus in quo*. Not only does the complaint allege title in the infant plaintiffs, subject to the dower interest of the widow, but the answer takes issue with that allegation, first, by denying it, and secondly, by alleging title in the defendant, Sabra Lawton, as lessee, of the soil on which the house stood, the removal of which was one of the trespasses alleged.

Oneida County Bank agt. Herrenden.

The counsel for the appellants contends that as the widow, as dowress, had no interest in the real estate, and could not recover in the action, except, possibly, for injuries to the possession, and as the heirs joined with the widow as plaintiffs, they are limited in their right of recovery, to such grounds of action as they had in common with her; that is, to injuries to the possession.

It is true, that until assignment of her dower, the widow could not recover for injuries to the inheritance. But the allegation of title in the infant plaintiffs, subject to the dower right of the widow, is not cut down or qualified by the fact that the widow is joined with them as a plaintiff. The only consequence at most is, that so far as injuries to the freehold are concerned she was improperly joined. But the misjoinder was not objected to by demurrer or answer, and was, therefore, waived (*Code Civ. Pro.*, sec. 499).

The defendants, by their answer, compelled the infant plaintiffs to establish title in themselves in order to recover for the alleged injuries to the freehold, beyond the infraction of their possessory rights.

The order should be affirmed, with ten dollars costs and disbursements.

BARKER and BRADLEY, JJ., concur; HAIGHT, J., not sitting.
So ordered.

COURT OF APPEALS.

ONEIDA COUNTY BANK agt. HERRENDEN and others.

Action—In United States court no bar to another, in a state court—Concurrent remedies—When a plaintiff entitled to.

That an action upon contract is pending in the United States court, is no bar to another action in a state court to enforce the same cause of action.

Oneida County Bank agt. Harrenden.

Decided January, 1886.

James S. Sherman, for appellant.

Nicholas E. Kernan, for respondent.

DANFORTH, J.—The question upon this record, stated most favorably to the appellant, is whether the pendency of an action upon contract in the United States circuit court is good ground for setting aside the service of a summons, issued in a court of this state, to enforce the same cause of action. As to it, the courts below have differed. We agree with the general term. At common law the pendency of another suit for the same cause could, at most, only be pleaded in abatement; but, where the former action is in a court of the United States or a sister state, it is no stay or bar to a suit in the courts of this state. A recovery in one might be pleaded to the further continuance of the other; but, until that was obtained, both might proceed to judgment and execution, when a satisfaction of either would require a discharge of the other (*Walsh agt. Durkin*, 12 Johns., 99; *Mitchell agt. Bunce*, 2 Paige, 620), and the rule is the same since the Code (*Burrows agt. Miller*, 5 How. Pr., 51; *Cook agt. Litchfield*, 5 Sandf., 330)

That the first action was commenced in a state court by service upon one of several joint contractors, and removed by him into the United States court, and the second action afterwards commenced by the service of a summons upon a different defendant, cannot relieve that defendant. The plaintiff is entitled to all the remedies provided by law for the collection of its debt, and need not be satisfied until it has had such a judgment as will bind the defendants individually as well as jointly. It might perhaps proceed in the same suit against the other defendants (*U. S. R. S.*, sec. 639, *subd.* 2) in the state court, or, after judgment against all in such form as would bind the joint property, take proceedings to charge the defendants not personally summoned. It was not bound to do either, but might, as in

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this instance, commence a new action (*Lane agt. Saller*, 51 *N. Y.*, 1; *Money agt. Tracey*, 92 *id.*, 581).

We think the order appealed from should be affirmed.

All concur, except MILLER, J., absent.

SUPREME COURT.

THE HEBREW FREE SCHOOL ASSOCIATION OF THE CITY OF
NEW YORK agt. THE MAYOR, &C., OF NEW YORK and
others.

Estoppel of judgment — effect of judgment which stands unreversed, when pleaded in a proceeding between same parties, and which covers all the claims made by the plaintiff.

As to all matters, either of fact or law, which legally might have been and actually were litigated in an action or special proceeding between the same parties, in a court of competent jurisdiction, the judgment rendered therein is binding and conclusive in all litigations between the same parties.

Where a former judgment between the same parties is given in evidence in a case on trial before a judge at special term, which judgment covers all the claims made by the plaintiff in such case, it is conclusive on the trial judge.

Special Term, February, 1886.

THIS action was brought to restrain defendants from collecting taxes imposed upon premises in the city of New York, occupied by plaintiff for a school, and to have said taxes adjudged illegal and void.

This was a retrial of the action, a new trial having been ordered by the court of appeals, upon reversing a former judgment in favor of the plaintiff.

A. D. Sanger, for plaintiff.

D. J. Dean, for defendant.

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VAN VORST, J. — When this case was in the court of appeals that court declined to pass upon the question as to whether the defendants were not estopped by the judgment of this court in the action between the same parties for the taxes of the years 1869 and 1870, for the reason that the judgment had not been pleaded or given in evidence in the case before it (*Hebrew Free School Association agt. Mayor, &c.*, 99 N. Y., 488).

The opinion of the general term affirming that judgment was adopted as the opinion of this court in the present case, and, as the court of appeals says in its judgment, "covers all the claims made by the plaintiff."

That judgment has been pleaded and has been given in evidence in the case before me, and if it "covers all the claims made by the plaintiff," I do not see but that it is decisive, at least in so far as I am concerned.

The court of appeals, in a late case (*Leavitt agt. Wolcott*, 95 N. Y., 212), in an action brought for the construction of a will, declined to pass upon the questions raised, for the reason that in an action of partition between the same parties the validity of the same will had been disposed of, the court of appeals holding that "whatever may be the rule as to such matters as might have been, but were not litigated in a prior action, it is well settled that as to all matters, either of fact or law, which legally might have been and actually were litigated in an action or special proceeding between the same parties, in a court of competent jurisdiction, the judgment rendered therein is binding and conclusive in all litigation between the same parties."

Considering the questions now raised to have been distinctly passed upon in the case between the same parties (*reported in 4 Hun*, 446), it is for the general term to decide to what extent, if any, that judgment is affected by this subsequent case in the court of appeals. That judgment still stands unreversed, and its effect as an estoppel yet remains to be determined. I hold it to be conclusive here. The plaintiff must have judgment.

Merchants' National Bank agt. Sheehan.

COURT OF APPEALS.

**MERCHANTS' NATIONAL BANK OF NEW YORK agt. SHEEHAN
and another.**

*Code of Civil Procedure, section 870—Examination of defendant by plaintiff
before suit brought authorized by this section.*

Under section 870 of the Code of Civil Procedure, an order *may* be granted to the plaintiff for the purpose of examining a person against whom he proposes to bring an action, but the granting of such order is entirely in the discretion of the court.

Decided January, 1886.

M. J. Scanlan, for appellants.

G. Zabriskie, for respondent.

ANDREWS, J.—The question on this appeal depends upon the construction of section 870 of the Code, which is as follows:

"The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court," &c., "may be taken at his own instance, or at the instance of an adverse party, or of a co-plaintiff or co-defendant, at any time before the trial, as prescribed in this section."

The question presented is whether this section authorizes an order for the examination of a person against whom an action is about to be brought, upon the application of the person who is about to bring such action, but before it has been actually commenced.

The section is obscure, and its interpretation is by no means clear. The deposition to be taken is of the person "who expects to be a party." A person who contemplates bringing an action expects to be a party thereto, and it seems to be clear that, under the section, he can procure his own testimony to

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be perpetuated. The person against whom the action is to be brought may expect to be sued. A suit may have been threatened, or he may know that a cause of action has accrued against him, or that a liability is claimed, likely to result in litigation. Is the remedy given by this section available to either of the persons so situated, and may an order be granted before suit brought, upon the application of either, for the examination of his adversary? Considering this section alone, the most natural meaning would seem to be that a person who expects to become or to be made a party to an action, may, on his own application, have his deposition taken in anticipation of the actual commencement of the suit, and that the words "or at the instance of an adverse party" only apply when the person seeking the examination of his adversary is a party to a pending action. The change of phraseology by the substitution of the word "party" in the second clause, for the word "person" in the first clause, gives some force to this construction. But section 879 seems to render it clear that a proceeding under section 870 may be instituted by an adverse party against the other, although no suit has been commenced, but is only contemplated. That section provides that certain specified sections for the punishment of contumacious witnesses shall apply "to the examination of a party or a person expected to be an adverse party." It would be absurd to provide for the punishment of a person who sought to perpetuate his own testimony. The section plainly was intended to provide for the case of a contumacious witness, expected to be made a party to an action, whose examination was sought by his adversary.

On the whole, we are of opinion that the order issued in this case, on the application of the bank, for the examination of Sheehan, against whom the bank was about to commence an action, was authorized, and that he was in contempt for disobeying it. The bank might have commenced its action, and then have procured an order for the examination of the defendant. The granting of an order in such a case as this, before suit brought, upon the application of the proposed plaintiff, is

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within the discretion of the court, but it can rarely happen that justice will be promoted by granting an order on the application of a proposed plaintiff, before the commencement of an action; and the practice, unless carefully guarded, may lead to great abuse.

The order should be affirmed.

All concur.

COURT OF APPEALS.

PEOPLE *ex rel.* SUPERVISORS OF ULSTER COUNTY agt. COMMON COUNCIL OF THE CITY OF KINGSTON.

Taxation — Costs on appeal from equalization of valuations — By whom paid — Board of supervisors power to audit such costs — Practice — Demand for hearing — Mandamus — Authority of board of supervisors to obtain — Neglect to levy equivalent to refusal to pay.

Where the board of supervisors of Ulster county audited a bill for costs and expenses of an appeal to the state assessors, by the supervisors of the city of Kingston, from the equalization of valuations against that city, although requested by the latter to wait until they could be heard on the matter; and the city of Kingston obtained a writ of *certiorari* to review the proceedings, which was dismissed, and on the defendants failing to levy the tax necessary to pay the bills, an order for a *mandamus* was granted at special term to compel them to do so, and affirmed at general term. On appeal from order at general term of affirmance:

Held, that the order granting the *mandamus* was proper and should be affirmed.

Where an appeal from equalization of valuations is sustained, the costs must be assessed to the wards, towns and cities in the county other than the appellant, but if it be not sustained, then they must be borne by the town, ward or city appealing.

The legislature has the power to constitute the board of supervisors a board to audit the expenses against the city, and the latter did not come within the statute prohibiting a judge from sitting in a case in which he is a party or is interested.

Where the city supervisors did not make a demand for a hearing until just before the time for the adjournment, they having knowledge of the

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matter for some time before, no legal right was invaded by the denial of the application for delay.

The board of supervisors had an interest to enforce the collection against the city, and although it did not directly authorize its attorney to procure a *mandamus*, its general retainer "in all matters in litigation," and the appointment of the committee, conferred ample authority to uphold this proceeding.

The omission of the city, while laying other taxes, to include these items, was equivalent to a refusal to pay it after the proceedings taken.

Decided January, 1886.

THE order which is the subject of this appeal affirmed an order of the special term in *mandamus* proceedings, instituted December 6, 1884, commanding the common council of the city of Kingston to levy and collect upon the taxable property of the city the sum of \$18,308.07, audited by the board of supervisors December 3, 1883, for costs and expenses incurred by the board on an appeal to the state assessors, taken by the supervisors of the city of Kingston, November 28, 1882, from the equalization of the valuation of the real and personal property of the several towns and wards in the county of Ulster, made by the board of supervisors at its annual session in that year. The appeal came on to be heard before the state assessors, and was dismissed November 16, 1883. The board of supervisors, on the 29th of November, 1882, after said appeal was taken, appointed a committee to take charge of the interests of the board on the appeal, with power to employ counsel and such clerical and other assistance as the committee should deem necessary, and take such measures as their counsel might advise or as they should deem meet and proper in the premises. Pursuant to this authority counsel were employed, and upon their advice the committee caused abstracts to be made of all conveyances recorded in the clerk's office of Ulster county for the period of five years, commencing January 1, 1878, stating the consideration named in each case. The expense of obtaining these abstracts exceeded \$2,000. The committee, also, by advice of their counsel, caused an appraisal to be made of each

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parcel of land of which there was a several ownership in the county of Ulster, by appraisers appointed by them for each town and ward in the county (there being sixty-three appraisers in all), at an expense of \$9,570.03. Other expenses were incurred for clerical and other work, stenographer's fees, house hire, printing, &c., including the sum of \$1,227.84 for special services of persons who, at the time, were members of the board of supervisors. The aggregate expenses, including therein \$4,500 for services of counsel, as audited by the board of supervisors December 3, 1883, after the decision of the state assessors, amounted to the sum of \$21,446.99.

The town of Marbletown also appealed from the equalization of 1882, which appeal was taken at the same time as the appeal by the city of Kingston, and the two appeals were carried along concurrently, and were heard together by the state assessors, with the same result in each case. The board of supervisors, upon auditing the costs and expenses as above stated, apportioned them as between the town of Marbletown and the city of Kingston, upon the basis of the total equalized valuation of the town and city respectively; the sum of \$18,337.18 being apportioned as the share of the city of Kingston, and the sum of \$3,109.81 as the share of Marbletown.

Prior to the decision of the state assessors, the board of supervisors and the city of Kingston respectively submitted to the assessors a statement in detail of the expenses incurred by each. The statement of the board of supervisors corresponded in the aggregate with the sum as audited December 3, 1883, to wit, \$21,446.99, and the expenses incurred by the city, as presented to the assessors, amounted to about the sum of \$18,800. Prior to the audit, and on the 21st of November, 1883, the board of supervisors (being then in session) appointed a committee to examine the bills of expenses incurred by the board on the appeals in the equalization proceedings, and to report. The bills, prior to that time, had been duly verified by the several claimants, and presented to the state assessors, and had been certified as correct by the committee originally appointed

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to act in behalf of the board, and it appears by uncontradicted evidence that the supervisors of Kingston and the counsel for the city, as early as on the 13th of November, 1883, were informed of the amount of expenses claimed to have been incurred by the board of supervisors. On the 1st of December, 1883, the counsel for the city notified the committee appointed November 21, 1883, that the city desired to be heard upon the matter of the audit, and to give testimony in respect to the bills presented. On the 3d of December, 1883, the committee reported to the board, and, on the report being read, the supervisors of Kingston requested the board to postpone the consideration until the next day, in order to give them time to examine the bills and make such objections as they might desire. The board, however, proceeded to act upon the report, and made the audit as before stated. No specific objections were made by the supervisors of Kingston to any of the items. It appears that it was the practice of the board of supervisors at its annual session to adjourn from the 5th of December to the 15th, to enable the clerk to prepare the tax warrants for delivery to the proper officers. The return of the board of supervisors in the *certiorari* proceedings, hereafter referred to, and which is in evidence in the case, states that the application for delay was regarded as not having been made in good faith, but to prevent the auditing of the bills at that session of the board. On the 7th of December, 1883, the city of Kingston procured a writ of *certiorari* to be issued to review the proceedings of the board of supervisors upon the matter in question. The affidavits used on the application for the writ show that the supervisors of Kingston, at that time, had full knowledge of the contents of the bills. The board of supervisors made return to the *certiorari*, and it was dismissed by the supreme court, May 31, 1884. An appeal was taken by the city to the court of appeals, and that court, having intimated on the argument that the order in the form in which it was made was not appealable, permitted the appeal to be withdrawn, with a view to an application to the court below for an amend-

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ment of the order, which application, however, on being made, was denied. Subsequently, and on December 4, 1884, the prior litigation having been ended, the board of supervisors, by resolution, directed that so much of the sum of \$21,446.99 originally audited as was audited to persons who were supervisors, viz., \$1,246.09, be levied and assessed on the county outside of Marbletown and Kingston, and that of the balance of said amount, \$17,271.77, with interest, making in all \$18,308.07, "be raised, levied and assessed" upon the taxable property of the city of Kingston, and be paid to the treasurer of the county. This sum was, on the 5th of December, 1884, included in the schedule of amounts to be raised for state and county expenses by the city of Kingston, and delivered by the board of supervisors to the defendant on the same day. The common council directed the raising of the amounts of the other items in the schedule, but omitted to take any action in respect to this item. The *mandamus* proceedings were commenced December 6, 1885. It is claimed that they were instituted without the authority of the board of supervisors.

John J. Linson, for appellant.

Alton B. Parker, for respondent.

ANDREWS, J.—The order made by the general term on the return to the writ of *certiorari* was not *res adjudicata* as to the validity of the assessment. It did not affirm or reverse the proceedings, but dismissed the writ. The allowance or refusal of a common-law *certiorari* rests in the sound discretion of the court. The dismissal of the writ was an exercise of this discretion; and the character of the order, as a discretionary one, is not altered by the fact that the court, in its opinion, examined the proceedings, and considered them regular (*People agt. Stilwell*, 19 N. Y., 530; *People agt. Hill*, 53 *id.*, 547; *People agt. Board of Com'rs, &c.*, 82 *id.*, 506). It is claimed in behalf of the city of Kingston, that the statutes regulating appeals to

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the state assessors, from the equalization of the board of supervisors, does not, on the appeal being dismissed, authorize the charging, against the town, city or ward appealing, the costs and expenses incurred by the board of supervisors in defending the appeal. This depends upon the construction of the statutes regulating this proceeding. The right of appeal from an equalization made by a board of supervisors was first given by chapter 312 of the Laws of 1859. Under that act an appeal was authorized to be taken, by the supervisors of any town, city or ward, to the state comptroller, who was authorized to determine what reduction, if any, ought to be made from the valuation fixed by the board of supervisors, of the property of the town, city or ward (*sec. 13*). No provision was made in this act for costs to either party. The act of 1859 was first amended by chapter 327 of the Laws of 1873. This last act added a section to the original act as follows:

"Sec. 15. Whenever an appeal shall not be sustained, the costs and expenses arising therefrom and connected therewith shall be made a charge upon the town, city or ward so appealing, which shall be audited by the board of supervisors, and levied upon the taxable property in said town, city or ward."

This provision remained unchanged up to the time of the audit in question. It will be observed that the act of 1873 made no provision for costs and expenses in case the appeal was sustained. This was first provided for by chapter 351 of the Laws of 1874, which added a clause to section 15 making it the duty of the comptroller, in case the appeal was sustained, to certify the reasonable costs and expenses of the appellant, and providing that the amount so certified should be audited by the board of supervisors, and collected from the towns and cities in the county other than the appellant. The act (*chap. 80 of the Laws of 1880*) further amended section 15 by substituting the state assessors as the certifying body, in place of the comptroller, when an appeal was sustained, and also providing that in that event the costs and expenses of both appellant and

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respondent should be audited and collected from the towns and cities other than the appellant. This was the condition of the legislation on the subject of costs and expenses on appeals in equalization proceedings in 1883, when the audit in question was made. The precise contention of the city of Kingston, as we understand it, is that the provision in the act of 1873 was not intended, in case the appeal was not sustained, to charge the costs and expenses incurred by the board of supervisors against the appealing town, city or ward, but was intended simply to protect and indemnify the supervisors by whom the appeal was brought, against the costs and expenses incurred by him in behalf of his town, and to put it out of the power of the town authorities to repudiate the claim, and saddle upon the supervisor the burden of the costs and expenses of the litigation. This construction has no support in the language of the act of 1873, and still less in the legislation which followed it. The acts of 1874 and 1880 expressly give costs to the appellant against the county in case the appeal is sustained, and it is quite difficult to suggest any reason for exempting the town, ward or city from a corresponding liability when the appeal fails. The construction of the act of 1873 contended for by the appellant is strained and unnatural, and, moreover, if the intention of the legislature was, as is claimed, to protect the supervisor as against the town, the act failed to afford complete protection, because it makes no provision for costs and expenses incurred by the supervisor in a case where the appeal is successful. We think the act of 1873 authorized the costs and expenses incurred by the board of supervisors on the appeal to the state assessors to be charged upon the city of Kingston. The costs and expenses audited by the board and charged upon the city embraced compensation to counsel, appraisers, and employes, and disbursements amounting in the aggregate to more than \$17,000.

It is asserted that many of the items audited were not such as would be taxed in favor of the prevailing party in an ordinary action. It is not claimed that any of the expenses audited

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were not incurred, or that they were incurred in bad faith. It certainly must be conceded that the preparation on the part of the board of supervisors to meet the issue presented by the appeal was very thorough. It, however, may well be doubted whether it was discreet or just to impose upon the city of Kingston and the town of Marbletown the entire expense of searching for and making abstracts of all the conveyances recorded in Ulster county for a period of five years, and of appraising every separate piece of real estate in the county. It may be assumed that few appeals will be taken to the state assessors from equalizations, at the hazard of paying such enormous expenses. The mass of evidence collected by the supervisors will doubtless be very useful in future equalizations, but the equity of charging the whole cost of the information upon the appellants in this case is not very apparent. But we have to deal only with the question in its strictly legal aspects. The act (*chap. 49 of the Laws of 1876*) amending the act of 1859 contemplates that evidence of valuation of real and personal property in the county shall be given, and it appears, without contradiction, that such evidence has usually been produced and received by the state assessors. The statute of 1873 is very broad. All costs and expenses of the appeal, "arising from or connected therewith," are chargeable. It constitutes the board of supervisors the auditing tribunal. What particular items shall constitute the costs and expenses mentioned, are not defined. It cannot be said that the employment of necessary appraisers and searchers, at a reasonable *per diem* compensation, and making the necessary disbursements in preparing for the investigation, were not legal items of expense chargeable under the statute. The determination as to their allowance the statute relegates to the board of supervisors, and the decision of the auditing board as to the amount, necessity, and reasonableness of the expense incurred, in the absence of fraud or collusion, is final and conclusive (*Osterhoudt agt. Rigney*, 98 N. Y., 222).

It is further objected that the legislature could not constitute the board of supervisors a board to audit the expenses chargea-

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ble against the city—the other party to the appeal—on the ground that thereby it was made a judge in its own cause. The authorities are decisive against the objection. The board of supervisors collectively had no interest to be affected by the audit, and its members as individuals had no interest other than was common to every tax-payer in the county. In making the audit they were discharging a duty of public administration cast upon them by law, and were neither within the letter nor spirit of the statute prohibiting a judge from sitting in a case in which he is a party or is interested (*People agt. Wheeler*, 21 N. Y., 82; FOLGER, J., in *Re Ryers*, 72 *id.*, 15; *Foot agt. Styles*, 57 *id.*, 399).

It is also objected that the board of supervisors denied a hearing to the supervisors of Kingston and their counsel, prior to the audit. The supervisors of the city were members of the board. The board, in its aggregate capacity, in exercising the powers conferred by statute, represented, not only the whole county, but each town and ward therein affected by its proceedings. The return to the *certiorari*, which is in evidence, shows that the demand for a hearing was not made until shortly before the time fixed for the adjournment of the board, and that in fact the supervisors of Kingston had knowledge of the bills presented for audit for some time before the demand was made, and, so far as appears, might have interposed any objections thereto. We think, under the circumstances disclosed, no legal right of the defendant was invaded by the denial of the application for delay.

The inclusion, in the original audit, of allowances to persons who were supervisors, for special services rendered, amounting in the aggregate to \$1,227, is not now in question. This sum is excluded from the amount sought to be charged against Kingston, and its inclusion in the original audit, if erroneous, in the final result inflicted no injury upon the appellant.

The point is also taken that the proceeding by *mandamus*, now under review, was never directed or authorized by the board of supervisors of Ulster county, and that for this reason

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the order maintaining the writ should be reversed. We entertain no doubt that the board of supervisors had such an interest in enforcing the collection of the costs audited by the board, and charged against the city of Kingston, that it could authorize any proper proceeding to be taken in its behalf to that end. It was the party respondent in the appeal. It was its duty, as the representative of the county, to defend its equalization if it believed it to be just, and, as incident to the duty, it could incur the necessary expenses in defending its action. The county incurred them, and was in the first instance liable for their payment. The expenses, when incurred, were, we think, county charges. The statute enumerates as among county charges (1 *R. S.*, 385, sec. 8, subd. 15) "the contingent expenses necessarily incurred for the use and benefit of a county." It has been frequently held that services rendered to a county in pursuance of a legal employment, for which no specific compensation is provided, are contingent charges against the county (*Bright agt. Supervisors, &c.*, 18 *Johns.*, 242; *People agt. Supervisors, &c.*, 12 *Wend.*, 257; *People agt. Supervisors of Delaware*, 45 *N. Y.*, 196). It is true that the act of 1878 declares that, if the appeal is not sustained, the costs and expenses "shall be a charge on the town, city," &c. But it cannot be known, until the decision of the state assessors, whether any costs or expenses will be chargeable against the party appealing. The board of supervisors must of necessity incur the expenses in the first instance on its own credit, and, having done so, it has a remedy over against the town, city or ward, in case it succeeds on the appeal. The board of supervisors, therefore, had an interest to enforce the collection of the charge against the city of Kingston.

The precise point is that it did not authorize its attorney to pursue the remedy by *mandamus*, or take other legal proceeding to enforce its right. We think the resolution of December 4, 1883, for the employment of judge PARKER, as counsel, "in all matters in litigation" growing out of the equalization appeal, and authorizing him "to take all necessary and proper proceedings in the name of the board in the actions and proceedings

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referred to," supplemented by the appointment of a committee, December 12, 1883, with full power to do all things in the litigation and incur such expenses therein as they might deem necessary in behalf of the board, conferred ample authority upon the counsel and committee to direct the commencement of this proceeding. The criticism upon the resolution of December 4, 1883, is that it only refers to matters "in litigation," and not to future litigation. This is quite too technical, in view of the fact that no litigation was then pending, and the resolution would be without meaning unless it referred to the controversy as to the audit and to litigations which might grow out of it.

The final objection is that the charge against the city of Kingston for the costs and expenses of the equalization appeal cannot be enforced through the ordinary statutory machinery for the collection of taxes in the city. The charter of Kingston provides a special system for the collection of taxes therein. The board of supervisors do not issue any warrant for the collection of the state or county tax chargeable upon the city. Section 72 of the charter requires the board to fix the proportionable amount of state and county charges to be paid by the city, a certificate of which is to be delivered by the clerk of the board to the clerk of the city, and it is then made the duty of the common council to raise the amount by tax upon (*sec. 73*), the warrant of the city clerk. The board of supervisors, in December, 1884, included in the schedule of taxes to be raised by the city its share of the expense of the equalization litigation. This was, we think, proper. The expenses were, as has been stated, in the first instance a county charge, but ultimately, as the event determined, to be paid by the city. The common council provided for the collection of the other items in the schedule, but omitted to take any action to levy the item in question. The *mandamus* proceeding was then instituted. It is now said that there was no refusal to collect this item. The omission to perform a plain duty is equivalent to a refusal, and one of the affidavits presented by the defendant in the *mandamus* proceeding sets forth the reasons "why the defendant

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will not raise the money," &c. We think the direction in the act of 1873, that the costs and expenses shall be audited by the board of supervisors and "levied upon the taxable property in said town, city or ward," is to be carried out by causing the same to be levied in the usual way provided for levying and collecting taxes in the city.

The order should be affirmed.

All concur.

NEW YORK SUPERIOR COURT.

HENRY PROUSE COOPER & COMPANY agt. ALEXANDER D.
FINDLAY.

Affidavit of merits—Merits of the application—Default—Affidavit of merits is not always sufficient—When absolute refusal to open justified.

On a motion to open a default an affidavit of merits is not always sufficient. An absolute refusal to open an inquest may be justified.

The party moving to open the default must state the grounds of his motion clearly, and under certain circumstances must meet the opposing affidavit.

General Term, April, 1886.

APPEAL from an order denying a motion to open a default.

The appellant had moved at special term to open a judgment taken by default at trial term for \$4,321. The motion was based on an affidavit and an affidavit of merits. The opposing affidavits put in by the plaintiff claimed that the defendant had admitted the embezzlement alleged in the pleadings, and that his counsel made a similar admission, and the said affidavits stated other grounds against granting the favor asked for. At special term the court denied the motion on the ground that "no merits had been disclosed."

John Lindley and Sutherland Tenney for appellant.

The default occurred through a mistake of the attorney.

Styles agt. Fuller.

The court never goes into the merits of a case when a verified answer and an affidavit of merits has been served.

W. G. Peckham and *E. W. Tyler* for respondent.

Probably judge FREEDMAN's memorandum meant "no merits" in the application as on the papers submitted. Several cases hold that under the circumstances the defendant should be required to show specific merits (*Dix agt. Palmer*, 5 *Hun*, 233; *Security Bank agt. Bank of Commonwealth*, 2 *id.*, 287; *Hunt agt. Wallace*, 6 *Paige*, 372). Defendant's laches is against the motion (*Melvine agt. Mathewson*, 5 *Law Bul.*, 51).

PER CURIAM.—The discretion of the judge was properly used. It would not have been proper to have opened the default. The statements as to the reason for the defendant not appearing are vague and indefinite, and the affidavit of merits was more than counterbalanced by the plaintiff's affidavits. The affidavit of merits would be true if the plaintiff had made an insignificant error in his demand.

Order affirmed, with ten dollars costs.

COURT OF APPEALS

STYLES agt. FULLER.

Practice—Action—Effect of bankruptcy of plaintiff after action begun, where the answer is a general denial.

The rights of parties to a legal action are to be determined as they were at its commencement, unless some event, happening subsequently, and affecting those already in issue, is presented by supplementary pleadings to the court, and the fact that plaintiff, after the commencement of the action, was declared a bankrupt, and that the cause of action had passed to his assignee, cannot be proven on the trial where the answer was a general denial.

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Edwin G. Davis, for appellant.

William F. MacRae, for respondent.

DANFORTH, *J.*—This suit was commenced in June, 1876. The complaint stated a good cause of action, and the answer of the defendant was in substance a general denial. The verdict of the jury upon the issues thus found was in favor of the plaintiff, and sustained his allegations. To defeat a recovery the defendant on the trial offered to prove that in May, 1877, the plaintiff was adjudged a bankrupt, and the alleged cause of action passed to his assignee. The offer was properly rejected. The rights of parties to a legal action are to be determined as they were at its commencement, unless some event, happening subsequently, and affecting those already in issue, is presented by supplemental pleadings to the court. Here the matter offered in evidence was not pleaded, and for that reason, if no other, was properly excluded. No other question is presented to justify this appeal. It should therefore fail, and the judgment be affirmed.

All concur, except MILLER, *J.* absent.

CITY COURT OF NEW YORK.

EPHRAIM HOWE agt. JAMES P. WELCH.

Statute of Limitations—As applied to non-resident debtors—Code of Civil Procedure, section 890.

Except as limited by section 890 of the Code of Civil Procedure, that section extends to non-resident debtors the protection of the Statute of Limitations in all cases where it has run according to the laws of the debtor's residence.

In determining this question the foreign law, as interpreted by the local courts of the state whose statute is invoked, must prevail. In other

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words, under our Code foreign debtors are allowed to bring with them the protection which their home government gives them while there—nothing more.

The courts of this state will not construe foreign statutes, but must accept the interpretation the local courts of the particular state place upon them. Each state is the best interpreter of its local laws.

General Term, April, 1886.

APPEAL from an order setting aside a verdict directed in favor of the plaintiff, and ordering judgment for the defendant.

Stickney & Shepard and N. S. Spencer, for plaintiff.

Abbott Bros., for defendant.

MCADAM, C. J.—Prior to the amendment contained in section 390 of the Code, a plea of the Statute of Limitations of another state or country, where the contract was made or the debtor resided, was no bar to an action upon the contract in this state, because the *lex fori* governed (*Miller agt. Brenham*, 68 N. Y., 83). The axiom of the law "that where there is a discharge by the law of one state or country it will be a discharge in another," does not apply to statutory discharges, because the laws of the state under which the discharge was granted have no extra territorial force, and for that reason the laws of limitation of a foreign state or country cannot of themselves be pleaded in bar to an action in this state, unless with the consent of the state, or in other words, except under the sovereign authority of the laws of the forum. It is therefore solely to our polity and laws that we must look for a determination of the question as to how far the laws of limitation of foreign states or countries are to be respected here.

On grounds of state comity the legislature of this state, by an amendment contained in section 390 of the Code (with certain exceptions irrelevant to this case), extended to non-resident debtors the protection of the Statute of Limitations in all cases where it had run and effectually discharged the debt accruing

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to the laws of the debtor's residence (*see Throops notes to sec. 390 of the Code*). In other words, if the statute of their own state as construed and enforced by their own courts protected them, foreign debtors were allowed to leave their homes and bring within the protecting ægis of our statute the protection which their home government gave them — nothing more.

To go further would be to extend to residents of other states advantages greater than their own laws afforded, a construction which brings no logical reason to its support. The defendant came from Iowa, and under the statute of limitations of that state, as construed by the Iowa courts, the controlling authority as to the proper construction of their local statutes (*Wharton on Conflict of Laws, sec. 776*), the debtor's promise to pay, although conditional, amounted to an acknowledgment of the continued existence of the debt, negatived the presumption of payment, and saved the case from the operation of the statute. Not being outlawed in Iowa, the home of the debtor, the debt is not outlawed here by force of the state comity evidenced by the provisions of section 390 of our Code. State comity does not require the courts of this state to interpret the local statutes of Iowa differently than the courts of that state construe them, for if upon the same proofs offered here the plaintiff could have recovered a judgment in Iowa, if the defendant had been sued there instead of in this forum, the same result ought on logical principles to follow here. In other words, Iowa law should not have one meaning there and another elsewhere.

This seems to us to be the proper test to be applied and the fair interpretation to be placed on the statute under examination, and the only one which can prevent an unseemly conflict of construction between the courts of the two states, a clash which every principle of state comity seems to require us to avoid. The trial judge therefore properly directed a verdict in favor of the plaintiff, but he erred in setting it aside and directing judgment for the defendant. The error was caused by ignoring the construction applied by the Iowa courts to their local statute, in *Penley agt. Waterhouse* (3 Iowa, 418), *Bayliss*

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agt. *Street* (51 Iowa, 627), *Ayres* agt. *Bane* (39 Iowa, 518), and by applying to that statute a different mode of interpretation, which has been adopted in this state in reference to its own local statute of an almost similar nature.

The true rule to follow, in cases depending on the laws of a particular state, is to adopt the construction which the courts of that state have given to those laws (*Angell on Limitations* [6th ed.], sec. 24; *Elmiendorf* agt. *Taylor*, 10 *Wheat.*, 152, 159; *Bell* agt. *Morrison*, 1 *Pet.*, 351, 360; *Leffingwell* agt. *Warren*, 2 *Black.*, 599). The reason for the rule is, that the courts of every state and country must be presumed to be the best expositors of their own laws and of the terms of contracts made with reference to them; and, as judge STORY observes: "No court professing to be governed by principle would assume the power to declare that a foreign court misunderstood the laws of their own country" (*Story on Conflict of Laws*, sec. 277).

Judge SWAYNE, in *Leffingwell* agt. *Warren* (*supra*), said: "The courts of the United States * * * recognize the statute of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. * * * The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as part of the statute, and is as binding upon the courts of the United States as the text." These views practically dispose of this appeal. We have examined the exceptions taken, and have considered the technical objections urged to matters of form and substance, and hold that, in view of all that appears in the record, they are without force. It follows that the order appealed from must be reversed, with costs, and the plaintiff permitted to enter judgment on the verdict originally directed in his favor.

HYATT, J., concurred.

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COURT OF APPEALS.

PEOPLE agt. MURPHY.

Practice—Criminal trial—Evidence—Privileged communication—Opinion deduced from—Declaration to physician—After declarations not a part of the res gesta—Code of Criminal Procedure, section 392—Code of Civil Procedure, section 834.

Where a physician is selected by the public prosecutor, and sent by him to a prisoner after a crime has been committed, and she accepts his services in a professional character, disclosures made by her to him are privileged communications, and this rule applies to all actions, civil or criminal.

The opinion of such physician as to whether an abortion has been committed, founded partly on such statements, is also inadmissible.

Although the prisoner was a party to the crime (abortion) and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gesta*, were not admissible.

Decided January, 1886.

Horace S. Bennett, for appellant.

Joseph W. Taylor, for the people.

FINCH, J. — We are of the opinion that section 834 of the Code of Civil Procedure is applicable to criminal actions, and that whatever possible doubt may have attended the question is fairly dispelled by section 392 of the Code of Criminal Procedure. The confidential character of disclosures by a patient to his attending physician was established before the Code by statute, and in terms which, beyond reasonable question, applied to all actions, whether civil or criminal (3 *Rev. Laws* [6th ed.], 671, sec. 119; *People agt. Stout*, 3 *Park. Crim. L.*, 670). That statute was substantially incorporated into the Civil Code in language broad enough to justify the same general application as that which characterized the older statute; and the further

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provision of the Code of Criminal Procedure, already referred to, seems to us intended to settle the question. No doubt upon that subject was intimated in *Pierson agt. People* (79 N. Y., 424), but in that decision the statute was construed, and we held it did not cover a case where it was invoked solely for the protection of a criminal, and not at all for the benefit of the patient, and where the latter was dead, so that an express waiver of the privilege had become impossible. The present is a different case. Here the patient was living, and the disclosure which tended to convict the prisoner inevitably tended to convict her of a crime or cast discredit and disgrace upon her. We have no doubt upon the evidence that between her and the witness, whose disclosure was resisted, there was established the relation of physician and patient. Although he was selected by the public prosecutor, and sent by him, yet she accepted his services in his professional character, and he rendered them in the same character. She was at liberty to refuse and might have declined his assistance, but when she accepted it she had a right to deem him her physician, and treat him accordingly. It follows that the exception to his disclosure of what he learned while thus in professional attendance was well taken.

But if his evidence had been admissible as being competent, another error was committed. He was sent to the patient after the crime was complete, when the abortion had been accomplished, and the patient was merely suffering the physical consequences of the crime. Although she herself was a party to that crime, and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations narrative of a past occurrence, and constituting no part of the *res gestæ*, were not admissible. These declarations were excluded by the court upon the objection of the accused, and properly excluded; but, notwithstanding, the attending physician was allowed to express his opinion as a medical expert that an abortion had been produced, founding that opinion not only upon what he observed of the physical condition of the woman, but upon all her statements, and upon the his-

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tory of the case as derived from her. The opinion of the general term concedes the error of such evidence, but insists that the opinion was founded upon her statements merely of the "locality of the pain, the condition of the injured part, and so on." We understand what occurred differently. When the witness was first asked his opinion whether the birth occurred from natural or artificial causes, he inquired whether, in giving his answer, he would be allowed to consider the clinical history of the case as he got it from the girl's statement, to which the prosecutor replied: "Certainly; I ask the question upon the whole history of the case, as you learned it from her, as well as from the examination." To this the prisoner objected. The court did not at once pass on the objection, but suggested that the physician answer first from his observation alone. He did so answer and said: "From my physical examination of the woman and the foetus it would lead me to believe that an abortion had been induced," and then added, as a reason, that natural miscarriages were not likely to occur at that stage of pregnancy with the frequency of earlier stages. How weak this evidence was upon the vital point whether the miscarriage arose from natural or artificial causes was made apparent on the cross-examination, where, in answer to the distinct question "whether or not, from such physical examination as you describe you made there, is it possible, as a matter of medical knowledge, science and experience, to say that a miscarriage had been produced," the witness felt constrained to answer, "No, sir."

The prosecutor, apparently feeling the need of adding some decisive force to the opinion, followed his first inquiry with this question: "On the personal examination that you made of the woman and the foetus, and the history of the case as you got it from her, what do you say now as to whether or not there had been an abortion, brought about by artificial means?" To this question the prisoner's counsel objected, as calling for hearsay and a privileged communication, and on the further ground that it involved "the history of the case," which had not been dis-

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closed. The district attorney offered to disclose it, and put the question, "what the girl said," which was objected to and excluded. Thereupon the court overruled the objection, and the witness answered: "I say an abortion had been produced." It is not possible on this state of facts to say justly that by the history of the case and the girl's statement was meant only her complaints of present pain and suffering. Nothing of the kind was suggested or pretended, or could have been understood by court or witness or jury. Indeed, on cross-examination, the witness described what he meant by the "clinical history of the case," saying: "I wrote down part of her statement, and testified to it in the police court, and that included how she came there, and what happened since she came to that house." So that the opinion of the expert that a crime had been committed, founded upon the narrative of the woman of previous facts, which narrative was itself inadmissible, and remained undisclosed, was given to the jury. Necessarily it carried with it damaging inferences of what the narrative in fact was, and drove the accused to the alternative of omitting all cross-examination as to the concealed basis of the opinion, or admitting inadmissible evidence.

We think there was error for which the judgment should be reversed, and a new trial granted, and the proceedings remitted to the court of sessions of Monroe county for that purpose.

SUPREME COURT.

MATTHEW HALE *et al.* agt. JOHN SWINBURNE.

Reference to hear and determine issues—action for attorneys' services, when referable.

In an action on an attorney's account, where the allegations of the complaint allege a general retainer and the performance of various services in criminal proceedings, *quo warranto*, and other matters, and the moving

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affidavits on motion for reference set forth more plainly that these services were rendered in many and different proceedings and cases, and upon separate, distinct and several requests, and there is no denial of any portion of the affidavit, except defendant alleges in his affidavit that plaintiffs were acting only about matters connected with a certain election.

Held. It is a proper case to refer, and does not come within the line of decisions that hold where services in only one action are involved that ought not to be a reference (*Bean agt. Bank of Elmira*, 19 W. D., 206, distinguished).

THIS was a motion made by plaintiffs after the joining of issue for an order appointing a referee or referees to hear and determine the issues herein.

The statement of facts contained in the pleadings and affidavits upon which the application was made are sufficiently set forth in the opinion.

An appeal was taken from the order appointing the referee, and the general term affirmed the order, basing their decision upon the following opinion, written at special term.

Albany Special Term, July, 1884.

Alpheus T. Bulkley, for motion.

Henry Smith, opposed.

PECKHAM, J. — The plaintiffs make a motion for a reference, which is opposed by the defendant. The plaintiffs in an affidavit show that the action is brought by them for services rendered as attorneys and counselors-at-law for defendant, and that the trial of the cause will necessarily require the examination of a long account.

A bill of items of plaintiffs' claim is annexed to the affidavit, which bill embraces the rendition of services between the 12th day of April, 1882, and June 30, 1883, and covers several pages of legal cap paper in enumerating its various items.

It further appears from the affidavit that the services were

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rendered in various matters and proceedings, and reference is made to the bill of items as confirmatory of such allegation; and it is also stated in said affidavit that many of such services were rendered on the special and separate request of the defendant; and the affidavit then enumerates quite a number of services thus performed before the recorder of Albany in relation to criminal charges against inspectors of election and in regard to alleged frauds in the seventh ward, and other services, and the affidavit states positively that these services were separate and distinct from the *quo warranto* action, and were performed upon distinct and several requests of defendant.

The defendant submits an affidavit in which he says that "the only business that has transpired in which the plaintiffs were pretending to act on any side in a case or other matter in which I was in any wise connected as a party, or personal in any wise, was about matters connected with the late election, at which it was claimed I was elected mayor and the certificate was awarded to Michael Nolan." The defendant then said that so far as he knows there is no dispute as to what services were actually performed by the plaintiffs, and that the points mainly in issue in this case are: 1. What was the retainer, if any? and, 2, were the services of any value to the defendant or any one else?

The defendant then adds his opinion that the administration of justice would be better assured if the issues in this action could be tried by a jury.

The complaint alleges that the defendant retained the plaintiffs; and then alleges the performance of various services in divers criminal proceedings, and also in an action of *quo warranto* and in other matters, and states the value of the services performed.

The answer denies that defendant retained or employed the plaintiffs to perform for him the services mentioned in the complaint, and denies that any such service as is alleged in the complaint was performed by the plaintiffs, or either of them.

The general term has decided that the answer herein puts in issue the services rendered.

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In this respect the opinion of the general term is at war with the opinion of the defendant as expressed in the second paragraph of his affidavit, for the general term holds that the answer puts in issue the rendition of the services themselves, aside from the questions which defendant in his affidavit regards as alone in issue, viz., for whom were the services rendered and what was their value.

Upon these papers has a case been made out in which an order of reference, aside from any question of discretion, would be a valid order? It may be here assumed that there should be a claim for services performed in more than one action or proceeding in order to justify a reference, although I am not prepared to go to the length of stating such a rule under all circumstances.

Here the affidavit of one of the plaintiffs is clear and unequivocal, showing the performance of many different services in many separate and distinct proceedings, and upon separate, distinct and several requests from the defendant.

This is not denied by the defendant, but as already stated, he alleges that the business in which plaintiffs were pretending to act on any side in which the defendant was connected as a party or personal, was about matters connected with the late election, at which it was claimed defendant was elected and the certificate was awarded to Michael Nolan.

This is no denial of the allegation of plaintiffs pointedly made, that in many different matters and proceedings, both civil and criminal, and particularly specified in plaintiffs' affidavit, the plaintiffs rendered services at the special and separate request of the defendant in each matter.

It may very well be that all services had relation to matters connected with the election for mayor, and yet it may equally well be that many services performed in such connection were in separate and distinct matters, some civil, some criminal, some in which defendant was a party and some in which the people were parties; some having one purpose and some having another and totally distinct purpose in view; the relief

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asked for or to be awarded was different in different cases, the civil proceedings of *quo warranto* having for their object the placing the relator in the office of mayor, while the criminal proceedings had for theirs the punishment of criminals for a violation of law.

The evidence taken in one matter was inadmissible in any other, and the employment of the plaintiffs to perform the services incident to any one of the proceedings enumerated would not include the performance of any of the other services enumerated in the plaintiffs' affidavit.

This case is, therefore, brought entirely out of that line of decisions holding that a case ought not generally to be referred where the services in one action only are involved; the reason being that in such case the contract of the attorney is entire to carry out the suit to its termination, and the various steps which he takes in the case do not aid in making up a long account, within the meaning of the law.

It seems to me clear that this case is in such view essentially different. In this light, there is no conflict between this case and that cited by the counsel for defendant of *Bean agt. Bank of Elmira* (19 *Week. Dig.*, 206).

I have seen the opinion of the court in that case delivered by LEARNED, P. J., and the fact of there being but one action, a single retainer for services in one action only is the ground upon which the decision therein rests.

I think this is clearly a referable case. Should it be referred? I am quite clear upon that question also, and I think it should. The affidavit of plaintiff, the pleadings and the affidavit of defendant, taken together, quite convince me that there is on *the record* a dispute as to the rendition of services, as to whom they were performed for, if performed at all, and as to their value; in other words, there are issues as to all the material matters going to make up a case in favor of plaintiffs and against defendant, excepting as to the partnership and the profession of the plaintiffs. If an attorney's account should ever be referred it seems to me that this is such a case.

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I am not prepared to say that a claim on the part of an attorney against an individual for services rendered in many and different proceedings and cases upon separate, distinct and several requests, embracing a very large number of items and quite a number of separate and distinct proceedings, should never be referred, and, on the contrary, I think this is a very proper case for such reference. I have not overlooked the allegation in the complaint, that on the 12th April the defendant retained plaintiffs and requested plaintiff Hale to take charge of various civil and criminal proceedings, &c., but upon reading the affidavit of one of the plaintiffs, which, upon that point, is undenied by defendant, the allegation is plainly made that there were various services, and separate, distinct, and several requests by defendant for their performance.

The allegation in the complaint is obviously directed more to the fact of a retainer by defendant than to the question of the separate and distinct services, and this question of the character of the services, their rendition upon several and distinct requests, is met in plaintiffs' affidavit used for this motion, and a detailed statement of the distinct and separate services rendered is given, and there is no denial of any of this portion of the affidavit in the answering one of defendant.

Upon the whole case, I think the facts render a reference the appropriate disposition to be made of this case. I shall order the case referred to three referees, one lawyer and two laymen, as suggested on the argument, and if an agreement cannot be had as to the referees the court will name them.

The order may be settled before me on two days' notice.

NOTE.—An appeal was taken from the order appointing the referee, and the general term affirmed the order, basing their decision upon the foregoing opinion, written at special term.—[Ed.]

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SUPREME COURT.

RUSSELL WHEELER, FRANK E. WHEELER and FRANCIS BEMAN,
Jr., agt. DAVID M. JONES.

Debt—Collateral security to—When does not extend time of payment of—Neglect of creditor to enforce does not release debtor.

The transfer of accounts against third parties, as security for an indebtedness of the assignor to the assignee, does not extend the time of payment of the original debt, unless it is so agreed.

To make the taking of collateral security extend the time of payment of the indebtedness secured, there must be either a positive agreement to that effect or the circumstances must show that such was in fact the intention of the parties.

Mere neglect on the part of a creditor to collect securities held by him as collateral security to a debt, will not release the debtor.

St. Lawrence Circuit, October, 1885.

W. H. Sawyer, for plaintiffs.

L. P. Hale, for defendant.

TAPPAN, J.—Plaintiffs as copartners under the firm name of Russell Wheeler, Son & Co., doing mercantile business at Utica, N. Y., on June 11, 1884, and on divers days until and on the 18th day of December, 1884, sold and delivered to defendant, a merchant at Canton, N. Y., goods to the amount of \$1,494.07, upon terms of credit that had expired upon the commencement of this action, on April 27, 1885, upon which interest had accrued, down to the time of the trial, to the amount of \$59.49, making their claim then the sum of \$1,553.56, upon which the defendant had paid in cash, work, labor and material, at different times since plaintiff's claim became due, the sum of \$748.42; to which should be added interest, \$26.84; making the sum to be deducted, \$775.26; and leaving the sum of \$778.30 unpaid at the date of the trial, October 14, 1885.

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The sum unpaid at the time above stated was not the subject of controversy between the parties.

The contention upon the trial was as to the effect of a written instrument made by the defendant and delivered to the plaintiffs on November 27, 1884, which was as follows:

"Whereas, I, David M. Jones, of Canton, am justly indebted unto the firm of Russell Wheeler, Son & Co., of Utica, N. Y., in the sum of \$1,360.64; now, therefore, for the purpose of securing said debt to said firm, I do hereby sell, assign and set over to them the following accounts and demands, to wit:

Caleb Pierce, of Madrid, account.....	\$100 00
Nelson Watson, of Canton, account	125 00
Homer Newton, of Canton, account	150 00
John D. Grange, of Canton, account	150 00
George L. Stanton, of Canton, account.....	97 00
Supervisors town of Canton, account	800 00
Trustees of First Presbyterian church of Potsdam, N. Y., account	865 00
Charles Cox, of Potsdam, account.....	185 00
Adam Fisher, of Madrid, note.....	76 00
North Chamberlain, Canton, account, about	140 00

The said assignees are to collect said claims as they respectively fall due, and place the several amounts so received from them to my credit as payments upon my indebtedness, and after the same shall be paid in full to return such claims as are uncollected to me, if any there be; also, to account to me for any amount received by them over and above the amount of their said claim and expenses of collection.

"Dated CANTON, November 27, 1884.

"D. M. JONES."

The defendant's counsel contends that the effect of this instrument, when accepted by the plaintiffs, was to extend the time of payment of their claim against defendant until the same could

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be collected from the accounts assigned, or until effort had been made sufficient to show that the claim could not be made from such accounts.

The assignment of the accounts was taken, not in *payment*, but as *security* for the plaintiffs claim.

It is well settled law that the transfer of accounts against third parties, as security for an indebtedness of the assignor to the assignee, does not extend the time of payment of the original debt, unless it is so agreed (*Carey agt. White*, 52 *N. Y.*, 135; *Kemmil agt. Wilson*, 4 *Wash. Circuit Ct. Rep.*, 308; *United States agt. Hodge*, 6 *How. [U. S.]*, 279; *Van Eiten agt. Troudden*, 67 *Barb. [S. C.]*, 342; *same case less fully reported*, 1 *Hun*, 432; *Elwood agt. Deifendorf*, 5 *Barb. [S. C.]*, 398).

To make the taking of collateral security extend the time of payment of the indebtedness secured, there must be either a positive agreement to that effect, or the circumstances must show that such was in fact the intention of the parties.

In *Dunham agt. Countryman* (66 *Barb.*, 268), the time of payment was plainly extended by the terms of a written agreement.

In *Dunker agt. National Bank of Fort Edward* (36 *Hun*, 565), the mortgage taken in the name of the creditors as security recited the note, and then said: "the same to be paid in manner following, giving fifteen days for payment."

The mortgage clearly fixed a later day for the payment of the original note, than that stated in the note itself.

In *Grocers Bank agt. Penfield* (7 *Hun*, 279), the defendant, Truax, had a note discounted with the plaintiff; when it became due he paid part of it, and gave two notes of Penfield & Stone, the other defendants, for the balance. These notes were obtained at the request of the bank officers for a sum, which, with the amount on deposit in the bank by Truax, for which he gave his check, made the amount of the note, which had become due. The bank refused to give up the original note, but, as far as the case shows, had resisted suit upon it. Upon suit brought upon the two notes last received by the bank after due, it was properly held that the effect of the transaction was to

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extend the time of payment of the original note until the two notes taken by the bank, under the circumstances above related, became due, and that such extension was a good consideration for the other two notes, and rendered them valid in the hands of the bank, although given by the makers to Truax as accommodation paper.

That was the case of giving negotiable paper, payable in the future, to take the place of a debt past due, made especially for that purpose, endorsed by Truax, which, when once transferred to the bank, would be good in the hands of the holder, if received for value before due.

In *Beard agt. Root* (4 *Hun.* 356), the written agreement, in terms, extended the time of payment of the note for six months, until the mortgage assigned became due.

Wakefield Bank agt. Truesdale (55 *Barb.* 602), was a case where the maker of a note, just before the note fell due, paid interest for six months in advance, which was indorsed by the cashier of the bank, "In't paid to Feb. 26, 1886," and the note was not paid or sued until after that time, and this was held to extend the time of payment to that time and release sureties. The decision is put upon the ground that all the circumstances, taken together, showed an intent of the maker, and the cashier acting for the bank, to make the extension.

In *F'lushman agt. Strain* (90 *N. Y.* 110), the note was sold to the creditor, and credited to the debtor on account—a different transaction from a transfer for security. By this, the time of payment of the original indebtedness was extended until the note taken in its place became due.

Hubbard agt. Gunny (64 *N. Y.* 457) was a case where the holder of a promissory note took a new note from the debtor, payable at a future day, and this was held, under the particular circumstances of that case, to operate to extend the time of payment of the original note until the note taken in its place became due. I think that there is no real conflict in the cases upon careful comparison.

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The case of *Kemmil agt. Wilson* (4 Wash. Circuit Ct. Rep., 308) was nearly identical with the case at bar in its facts. The action was upon a promissory note made by Kemmil. After it became due Wilson assigned to Kemmil two recognizances, as the case states, "to be held by the said Kemmil as collateral security for the debt due by the said Wilson to him, to be collected by Kemmil as he may think proper, and the balance due upon the recognizances, after discharging the said debt, to be paid by said Kemmil to the said Wilson."

The defendant's counsel contended before the jury, that the assignment ought to be so construed as to compel the plaintiff to use all the necessary means to coerce the payment of the recognizances, before he could sue for the original debt; that for ought that appeared, he might have collected some portion, or the whole amount of the recognizances, and, at all events, he then had the whole control over them as assignee.

Judge WASHINGTON charged the jury that these recognizances were assigned to plaintiff expressly as collateral security, and consequently they could not be considered as payment or satisfaction of the original debt, or as operating even to suspend the plaintiff's remedy to enforce the payment of it.

In referring to the defendant's contention he uses this language: "If the plaintiff's right to sue for his original debt is suspended at all, it would be difficult to say at what time, or upon what contingency, the suspension could be removed; the contract points out none, nor has the defendant's counsel undertaken to suggest any."

"If the evidence of debt assigned to the creditor be negotiable, and have been parted with by him, he cannot recover upon the original debt, because the debtor might, in such case, be twice charged * * * by payment of the original debt. The defendant becomes in equity, as he is in law, the owner of these recognizances, and entitled to collect their amount or enforce payment of them;" that if anything had been paid to plaintiff it would operate, *pro tanto*, as payment upon the original debt; that it was for defendant to make proof of such

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payment. The court in that case directed a verdict for plaintiff. In the case at bar the defendant could, at any time, have paid his indebtedness to the plaintiffs, and such payment would have operated to reinvest him with the several claims assigned to them as security for the payment of their debt.

Mere neglect on their part to collect these claims would not release defendant (*Gilbert agt. Marsh*, 12 *Hun*, 519).

The construction claimed by defendant would be unjust to plaintiffs, because it would operate to indefinitely postpone the time of the payment of their claim against defendant, when it has not been so stipulated in the agreement, deliberately formulated and reduced to writing.

Construed in the light of the authorities, it is not ambiguous or of doubtful construction.

Judgment is directed for plaintiffs.

COURT OF APPEALS.

HILDRETH agt. CITY OF TROY.

Jurors—Who competent—Resident of Troy competent in case against the city—When rejection of juror ground for reversal—Code of Civil Procedure, sections 1027, 1032, 1033, 1166, 1180.

A citizen of the city of Troy is qualified to sit as a juror by chapter 1, section 16, Laws 1816, in an action against such city; and the rejection by the court of such juror, otherwise competent, is ground for reversal, although the jurors who actually tried the cause were competent. Parties have the right to have the first twelve competent jurors drawn, who are indifferent, and not discharged or excused, constitute the jury.

Decided January, 1886.

W. J. Roche, for appellant.

James Lansing, for respondent.

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ANDREWS, J.—This action was brought to recover for injuries sustained by the plaintiff, from the negligence of the defendant, in failing to keep Congress street, in the city of Troy, in safe condition for travel, and resulted in a verdict for the plaintiff for \$1,800. It appears from the case that, upon the impaneling of the jury, the plaintiff "excused" eight jurors drawn from the regular panel, and residents of the city of Troy, upon the ground that they were interested in the result of the action, to which proceeding the city attorney objected, on the ground that residents and tax-payers of the city are not disqualified as jurors in city cases, if otherwise competent. The court overruled the objection, and held that all such jurors were disqualified, to which ruling the attorney for the defendant excepted. Thereafter four additional jurors, residents of the city, were drawn, and the same proceeding was held, and they were excluded from the panel. The jury-box was filled from other names in the panel, and none of the jurors who sat were objected to or challenged. It is not claimed that the jurors excluded by the ruling of the court were interested, except as tax-payers of the city. By the rule of the common law the inhabitants of a municipality, or the members of any body politic, were incompetent to sit as jurors in a case in which the corporation was a party. They were deemed to be interested, and such interest was a good cause of principal challenge (*Co. Litt.*, 157, a, b). The common law has been modified in this state by general statutes, making the inhabitants of a town or county competent jurors in suits brought by or against such town or county (1 *R. S.*, 357, sec. 4; *p.* 384, sec. 4; 2 *R. S.*, 420, sec. 58), and, as to the inhabitants of cities, by special provision, inserted in nearly all cases, in the charter of incorporation. But the charter of Troy, enacted in 1816, provides:

"And be it further enacted, that upon the trial of any issue, or upon the taking or making of any inquisition, or upon the judicial investigation of any facts whatever, to which issue, inquest or investigation the mayor, recorder, aldermen and commonalty of said city are a party, or in which they are interested, no per-

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son shall be deemed an incompetent juror by reason of his being an inhabitant, freeholder or freeman of the said city" (*chap. 1, sec. 16, Laws 1816*).

This provision has never been repealed or amended, and was in force at the time of the trial of this action. The ruling of the learned trial judge, excluding from the jury the residents of Troy on the ground of interest, was in contravention of this explicit provision of law, and was plainly erroneous.

The question presented is, whether the error of the judge is ground for the reversal of the judgment. The proceeding on the part of the plaintiff was in substance a challenge. It was so treated by the attorney for the city and by the court. The court ruled that residents of the city were legally disqualified as jurors, and excluded them on that ground alone. The right of a party to except to a determination of the court upon a challenge to a juror, and to have such determination reviewed on appeal, is expressly given by the Code (*sec. 1180*). This section recognizes the determination of a challenge as involving a legal right, which may be reviewed, and, if erroneous, set aside. The general term disposed of the question on the ground that the rejection of a competent juror was not ground of error, where the jurors who actually try the case are competent. We cannot assent to this view. In our judgment, the adoption of this principle might seriously imperil the system of jury trial, and lead to practices which the statutes regulating the drawing of jurors were designed to prevent. The main purpose of the statutes for the drawing and selection of trial jurors is the securing of a fair and impartial jury. To this end provisions are made, which, if followed, prevent the selection of a jury, either by the court, or the officers of the court, or by either of the parties to the action, and exclude from the jury-box all jurors not indifferent, or who for any reason are disqualified to act as jurors; while at the same time they secure to the parties the advantage of a jury constituted by lot from all the qualified jurors, undrawn on the panel. By the statute of 3 *Geo. II* (*sec. 11*), "for the better regulation of juries," it is provided that

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the first twelve persons drawn and appearing, and approved as indifferent, should be the jury to try the cause. This provision was incorporated into the Revised Laws of 1813 (1 *Rev. Laws*, 331, *sec.* 20), and into the Revised Statutes (2 *R. S.*, 420, *sec.* 61), and was re-enacted in the Code of Civil Procedure (*sec.* 1166) without any substantial change. The section of the Code is in this language:

"The first twelve persons who appear as their names are drawn and called, and approved as indifferent between the parties, and not discharged or excused, must be sworn, and constitute the jury to try the case."

Sections 1032 and 1033 enumerate causes for which jurors may be discharged or excused. The language of section 1166 is mandatory. The first twelve persons drawn, who appear, and are indifferent, and not discharged or excused, must, the section declares, be sworn and constitute the jury.

Blackstone refers with just admiration to the safeguards thrown around the selection of a jury by the English statutes, and observes that they are admirably designed for the avoiding of frauds and secret management, by electing the twelve jurors out of the whole of the panel by lot (2 *Bl. Com.*, 365).

It is said that no injury resulted to the defendant from the erroneous exclusion of the city jurors, and a competent jury actually tried the case. The court cannot say that the trial would have resulted differently if the city jurors had not been excluded. On the other hand, the contrary cannot be affirmed. It is certain that except for the erroneous ruling the jury would have been differently constituted. Jurors differ in intelligence, judgment and fitness to act as jurors. It is, we think, the legal right of a party to have the chance that the best man may be drawn, and that the range of selection shall not be limited by excluding without cause competent jurors from the panel. It cannot be doubted that if an incompetent juror had been admitted, against the objection of the defendant, the judgment would be set aside, and yet in many cases it would be impossible to show any actual injury. A person not a resident of

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the county, or over sixty years of age, or without the requisite property qualification, is not a competent juror (*Code, sec. 1027*); but it would, we conceive, be no answer to an exception taken to his admission that no actual injury was shown to have resulted. The violation of the legal right of the party to have the case tried by competent jurors would be conclusive.

The error in this case was in improperly rejecting competent jurors. The court added a disqualification not only not found in the statute, but which the statute declares shall not constitute a disqualification. The law allows in a civil case two peremptory challenges to each party. The action of the court was equivalent to allowing the plaintiff fourteen peremptory challenges, because it excluded from the jury, without adequate cause, upon the motion of the plaintiff, fourteen jurors presumably competent. If the court had in form allowed the plaintiff more than two peremptory challenges, would it be an answer to an exception that nevertheless there was no legal injury, since a competent jury was subsequently impaneled?

We think the error of the court in excluding the city jurors is available to the defendant on this appeal. The learned trial judge doubtless decided the point under a misapprehension that the case was governed by the common law, without having in view the statute of 1816. But the charter is declared on its face to be a public act, and the judge is presumed to have had notice of its provisions. It does not appear whether his attention was specially called to the provision in section 16, but the counsel for the plaintiff took the objection to the jurors specifically on the ground that, as residents of Troy, they were interested, and so disqualified, and the defendant's counsel insisted that they were not disqualified for that reason, and the court ruled the point for the plaintiff. We think he must bear the consequences of the error, and that he cannot escape by charging the defendant with a violation of duty in omitting to call the attention of the court to the provision of the statute of 1816, which, so far as appears, may not have been known to him at the time.

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We think the judgment should be reversed. The statute makes elaborate provision for securing an impartial jury. It provides that the first twelve competent jurors drawn, who are indifferent and not discharged or excused, shall constitute the jury. The law prescribes the qualification of jurors. The court cannot add to or detract from them. It cannot itself select the jury, directly or indirectly. It cannot in its discretion or capriciously set aside jurors as incompetent whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left. If this is done a legal right is violated, for which an appellate court will give redress. The jury system, to be successfully administered, requires not only absolute impartiality in fact in the drawing of jurors, but such an adherence to forms and methods of procedure as will secure public confidence and prevent any suspicion of improper or unfair dealing.

We have not lost sight of the cases holding that mere irregularities on the part of ministerial officers in the selection and drawing of jurors is not ground of error, unless it appears that they operate to the prejudice of the party (*Friery agt. People*, 41 N. Y., 425; *Ferris agt. People*, 35 *id.*, 125; *People agt. Ransom*, 7 *Wend.*, 417); but the erroneous exclusion by a judge, on the trial, from a particular panel, of a class of persons regularly drawn, on the ground of incompetency, stands, we think, upon a different principle, and is governed by different considerations.

The judgment should be reversed.

All concur, except MILLER, J., absent.

Abeel *et al.* agt. Anderson.

SUPREME COURT.

GEORGE ABEEL *et al.* agt. JOHN J. ANDERSON.

Execution—Lien of—How created—Code of Civil Procedure, sections 2436–8447

The plaintiff issued execution on judgment against defendant, and the sheriff demanded payment of the execution. Then defendant made a general assignment, and thereafter the execution was returned unsatisfied, and a receiver was appointed on supplementary proceedings:

Held, that the judgment and execution and the demand of payment under the execution in its lifetime did not create a lien which can be enforced under sections 2436–2447 of the Code.

First Department, General Term, April, 1886.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order of the special term denying motion to compel James S. Allen, as assignee of John J. Anderson, to pay the plaintiffs' judgment recovered against Anderson.

E. S. Hatch, for appellant.

D. Nicoll, for respondent.

DAVIS, P. J.—The plaintiffs in this action recovered their judgment against the defendant John J. Anderson, and issued execution thereon on the 1st of October, 1884. On the 8th of October, 1884, the defendant made a general assignment for the benefit of creditors to James L. Allen, the respondent on this appeal. The plaintiffs claim that their judgment and execution was a lien upon the property of the defendant prior to such general assignment. No levy had been made of the execution before the assignment, but a demand for payment of the execution was made by the sheriff prior to the making of the assignment, and thereafter the execution was returned un-

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satisfied. Proceedings supplementary to execution were had, and one Henry A. Wheeler was appointed receiver of the property of the defendant. The receiver duly qualified.

The question presented is whether the demand made by the sheriff of payment of the execution operated to give him such a lien upon the property of the defendant as entitles the plaintiffs to the remedy they now seek. The court below held that no lien was acquired.

Section 1405 of the Code of Civil Procedure provides that the goods and chattels of the judgment debtor situated within the jurisdiction of the officer, are bound by the execution from the time of its delivery to the officer to be executed.

This relates, however, only to such property as can be levied upon and sold by the sheriff; and there must be an actual levy during the life of the execution, otherwise the lien of the execution is lost (*Hathaway agt. Howell*, 54 N. Y., 97; *Walker agt. Henry*, 85 *id.*, 134). In this case there was no lien upon any property. The execution was returned unsatisfied and a receiver in supplementary proceedings was thereafter appointed, who duly qualified. If Allen, the assignee of the judgment debtor, did not take title of the assigned property, then the receiver appointed in the supplementary proceedings was vested with such title. But the validity of the assignment in this case is not attacked. It is simply asserted that the judgment and execution and the demand of payment made upon the defendant under the execution in its lifetime created a lien which can be enforced under sections 2436-3447 of the Code.

We are of opinion, as was the court at special term, that no such lien was created by the demand, and that the title of the assigned property vested in the assignee, Allen, and so far as any facts are developed in this case, can only be reached and affected by the plaintiffs as judgment creditors, by an action begun either by themselves or the receiver to set aside the assignment upon grounds affecting its validity.

But whatever may be the remedy that exists, it is quite clear to us that under the provisions of the Code the court had no

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power to order the application of the property or its proceeds in the hands of the assignee upon the judgment of the plaintiffs for its payment.

The order should be affirmed, with ten dollars costs and disbursements.

DANIELS and BRADY, JJ., concurred.

SUPREME COURT.

THE MAYOR, ALDERMAN AND COMMONALTY OF THE CITY OF
NEW YORK agt. THE FULTON MARKET FISHMONGERS' ASSO-
CIATION.

THE SAME agt. SAMUEL L. STORER.

New York (city of) — Piers and wharfs — Power of the legislature to regulate the making or taking of leases of real estate by the corporation of New York — Fulton fish market — Validity of lease — Duty of clerk of common council as to leases.

The legislature has power to regulate the use of piers and wharfs in the city of New York, although the same are the property of the corporation.

The legislature has also the power to regulate the taking or making of leases of real estate by the corporation of the city of New York.

The defendants, the Fulton Market Fishmongers' Association, was incorporated by chapter 277 of the Laws of 1869, and by section 8 of said act the commissioners of the sinking fund were authorized to lease to said corporation the present fish market, with portions of the piers adjoining on either side, for a term not exceeding ten years, and providing for the construction of new buildings for a fish market. Pursuant to that act a lease was made for ten years, and in 1879 a new lease for ten years was made. This action is brought to recover two quarters' rent in 1884 under this lease. The commissioners of the sinking fund, under the act of 1883, amending the act of 1869, duly authorized the execution of the lease relied on by the defendants, on condition of the surrender of the then existing lease and of the execution of the new lease by them. This lease having been approved by the counsel to the corporation, was executed by the defendant and also by the mayor, but the seal of the city was not affixed thereto. Defendants surrendered the old lease.

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Held, that the act of 1883, amending the act of 1869, is not in conflict with the constitution of this state, and these acts do not in any way violate the corporate rights of the city of New York.

Though the clerk of the common council should sign any leases made by lawful authority, and should fix the seal of the city upon all such leases, as he is made by section 76 of the consolidation act the custodian of such seal, and his signature is thereby required to be fixed to all leases made by the city, yet as defendants have done everything in their power to carry out their contract with the city, it does not rest with the plaintiffs to assert that the old contract, which was abrogated by the new, is still in force in consequence of the wrongful act or insubordination of their agent.

Special Term, April, 1886.

E. Henry Lacombe, counsel to corporation, for plaintiff;
David J. Dean, of counsel.

Adolph L. Sanger, for common council; *Abel Crook*, for defendant; *Elliott Sandford*, of counsel.

LAWRENCE, *J.*—The first of these actions is brought to recover the sum of \$3,250, the amount of two quarters' rent, which it is alleged became due on the 1st of May and 1st of August, 1884, under a lease from the plaintiffs to the defendants of the right to use and occupy as a fish market, during the term of ten years, from May 1, 1879, the premises then used and occupied by the defendants as a fish market, situated at the slip on the East river, in the city of New York, next northeasterly of the slip at the foot of Fulton street, including the easterly one-half of pier number 22 and the westerly one-half of pier number 23, on either side of said slip for the distance of one-half of the said piers in length, from the bulkhead of said slip on South street, together with said bulkhead, with the appurtenances, and with the right to collect and retain all the wharfage which might accrue for the use and occupation by vessels of more than five tons burden of the aforesaid parts of said piers and bulkheads.

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The second action is brought against Samuel L. Storer, George S. Lamphear and John H. Lynch.

In the complaint in this action it is alleged that the plaintiffs, on the 25th of April, 1882, acting by and through their department of docks, sold and assigned to the defendants, at public auction in the city of New York, the right to collect and retain all wharfage which might accrue for the use and occupation by vessels of more than five tons burden of the outer one-half of the easterly side of pier number 22, East river, for the term of three years from the 1st day of May, 1882, with license and permission to the said defendants to enter and occupy the said premises, and that the defendants promised and agreed to pay to the plaintiffs the annual sum of \$5,100, in equal quarterly payments, in advance, on the first days of May, August, November and February during each year of said term, and that the defendants have neglected and refused to pay to the plaintiffs the sum of \$1,275, which by the terms of said agreement became due from the defendants to the plaintiffs on the 1st of May, 1884, and the further sum of \$1,275, which became due on the 1st of August, 1884.

As another cause of action, the plaintiffs allege that on the said 25th day of April, 1882, acting by and through their department of docks, they sold and assigned to the defendants, at public auction in the city of New York, the right to collect and retain all the wharfage and crannage which might accrue for the use and occupation by vessels of more than five tons burden of about two hundred and eleven feet of the outer end of the westerly half of pier number 23, East river, for the term of three years, from the 1st day of June, 1882, with license and permission to the said defendants to enter and occupy the said premises; that the defendants promised and agreed to pay to the plaintiffs the annual sum or rent of \$2,125 therefor, in equal quarterly payments, in advance, on the first days of June, September, December and March in each and every year during said term.

It is then alleged that the defendants have failed to pay the

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plaintiffs the two quarters' rent which became due on the first days of June and September, 1884, respectively.

The answer of the defendants in the first case admits the making of the lease and the non-payment of the two quarters' rent, for which the action is brought, and that the defendant is a corporation incorporated by chapter 277 of the Laws of 1869, entitled "An act to incorporate the Fulton Market Fishmongers' Association of the City of New York." It is alleged, by way of affirmative defense, that on or about the 25th day of April, 1882, the plaintiffs, through their department of docks, sold at public auction to Samuel L. Storer and others, acting as trustees for that purpose of the defendant, the right to collect and retain all wharfage, for the use by vessels of more than five tons burden, of the outer one-half of the easterly side of pier number 22, East river, for the term of three years, from the 1st day of May, 1882, at the annual rent of \$5,100, payable in equal quarterly payments in advance, from the first days of May, August, November and February in each year, which trustees signed an agreement in writing to that effect.

It is also alleged that at the same sale the said plaintiffs likewise sold to Storer and others, acting as trustees for that purpose for the defendant, the right to collect and retain all wharfage for the use and occupation by vessels of more than five tons burden of about two hundred and eleven feet of the outer end of the westerly half of pier number 23, East river, for the term of three years from the 1st of June, 1882, at the annual rent of \$2,125, payable in equal quarterly payments in advance, on the first days of June, September, December and March in each year during said term, which trustees signed an agreement in writing to that effect.

It is then alleged that all rent which became due up to the 1st of May, 1884, and up to the 1st of June, 1884, has been paid under the said lease by the defendants to plaintiffs.

It is further alleged that by chapter 412 of the Laws of 1883, section 3 of chapter 277 of the laws of 1869, being the act

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under which the defendant, The Fishmongers' Association, was incorporated, was amended so as to read as follows:

"§ 3. The commissioners of the sinking fund of the city of New York are hereby authorized to lease to the said corporation the present fish market, including one-half of the piers adjoining the same on either side thereof, for the whole distance in length from the bulkhead of said slip, and the lands and waters of the said slip between the same, for a term not exceeding twenty-one years for the purposes aforesaid, upon such terms and conditions as they shall deem most advantageous for the city, and providing for the construction of such new building or alterations, additions and improvements to the present buildings for a fish market, of iron or wood, as they may deem advisable, without delay, provided nevertheless that such lease shall be for the use of all persons now holding stands in the said fish market, to the same extent that they now hold the same, who shall become members of the corporation created by this act, which they are hereby authorized to do within three months after the passage of this act. And further provided, that the said fish market shall be subject to the laws, ordinances and regulations of the corporation of New York, relating to public markets, not inconsistent with the purposes of this act. And further provided, that such lease shall be accepted by the said corporation during the existence of or immediately upon the termination of the existing lease or leases of the said premises, which lease or leases said corporation is hereby authorized to surrender, and the said commissioners of the sinking fund are hereby authorized to accept as a condition of such new lease."

It is further alleged that in or about October, 1883, said association presented its petition to the said commissioners of the sinking fund, wherein after fully stating the facts and reasons therefor, requested said commissioners to give effect to chapter 412 of the Laws of 1883, by granting to said association a lease of said premises, and as a condition thereof that the then existing leases should be surrendered by the then

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said leases, and be accepted by the said commissioners; that by said petition the term of the new lease was requested to be fixed at twenty-one years, from May 1, 1884, and the rental was to be fixed at a fair valuation, and the terms and conditions were to be agreed upon so that said association might be enabled to provide the facilities and improvements necessary to the fish trade of New York, and to secure a sinking fund to reimburse said association for its improvements.

That thereupon said commissioners, after hearing the views of the dock department, and considering its communications upon the subject, and after hearing the reasons of the said Fulton Market Fishmongers' Association why its petition should be granted, did on the 24th day of December, 1883, by unanimous vote of the mayor, recorder, comptroller, chamberlain and chairman of the finance committee of the board of aldermen, constituting such commissioners, resolved that the prayer of the petitioners be granted, and that the matter be referred to the comptroller and counsel to the corporation, for the purpose of carrying into effect the provisions of the act of the legislature referred to in said petition, and in accordance with the prayer of the petitioners, and that the proposed lease be submitted to this board for approval before execution.

It is further alleged that thereafter said comptroller, after conference with said department of docks, and after proper appraisal by others appointed by him for that purpose, and after negotiations with defendant and said counsel to the corporation, united in a report to the said commissioners of the sinking fund, bearing date April 21, 1884, in which it was stated that a fair and reasonable annual rent for the wharf property required by the Fulton Market Fishmongers' Association, to prosecute their business as wholesale dealers in fresh fish, would, in their judgment, be \$12,000 per annum for a lease of twenty-one years, and that a lease has been accordingly prepared by the counsel to the corporation, which was therewith submitted to the commissioners of the sinking fund before execution.

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It is further alleged that at their said meeting the commissioners of the sinking fund approved the lease so submitted, and thereby authorized a lease to the defendant of said premises and wharf property at the yearly rental of \$12,000, for the term of twenty-one years, commencing May 1, 1884, payable quarterly in advance, and upon the further terms and conditions that the existing leases thereof, being the same mentioned in the complaint and others, should be surrendered, and that the association should execute the lease in said resolution provided for, pursuant to the provisions of chapter 412 of the Laws of 1883, and authorized and directed the mayor and clerk of the common council to execute said lease, when approved by the counsel to the corporation and authorized the comptroller to deliver the same when so executed, and when a counterpart of said lease shall have been executed by the proper officers of said association, and it has been recorded in his office.

It is further alleged that the association in good faith did accept the said lease, and executed and delivered to the plaintiffs the counterpart of said authorized lease, and delivered the same to the plaintiffs, who accepted a surrender of the existing leases, &c., which counterpart and surrender severally were thereupon duly received by said comptroller for record in his office, and said lease was duly approved by the counsel to the corporation, and was thereupon duly executed by the mayor, as directed by said resolution, but that the same has not been executed by the clerk of the common council, nor has the seal of said city been affixed thereto. That the association has requested the plaintiffs to deliver to it the counterpart of said lease, as by said resolution directed, but plaintiffs have not yet complied with such request. It is then alleged that the association has, in good faith and before this action was commenced, duly tendered payment of the rent due under said new lease, and that the plaintiffs have refused to receive the same, wherefore it is demanded by the defendant that the complaint be dismissed.

The answer in the second case, after admitting the sale of

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the 25th of April, 1882, by the dock department, of the right to collect and retain wharfage, &c., on the parts of piers 22 and 23, East river, in the complaints referred to, sets forth that the purchase by the defendants of said rights and sales by the plaintiffs, to them aforesaid, were not made to them individually, nor were the agreements aforesaid signed by them as individuals, but as trustees for the Fulton Market Fishmongers' Association, the defendants in the first case. The answer then goes on to set forth substantially the same facts as are averred in the answer of the Fishmongers' Association above set forth.

On the trial of this action the plaintiffs were represented by the counsel to the corporation, and the common council, claiming to be specially interested in the questions involved, also appeared by counsel. The facts averred in the answers of the defendants in each case were fully proved upon the trial.

Elaborate briefs were subsequently filed by counsel for the respective parties, and as the corporation counsel had given an opinion on the 9th of August, 1884, to the commissioners of the sinking fund, adverse to the view of the common council and its clerk, that the clerk was under no obligation to sign the new lease until directed so to do by the common council, a brief was submitted on behalf of the common council. The main questions arising in this case were fully discussed in the brief of the counsel for the common council. Various objections are taken in that brief to the validity of the lease authorized by the commissioners of the sinking fund, but the principal question discussed was as to the constitutionality of the act of 1883, chapter 412, and as to whether a new lease could be given, whether the same would be valid and effectual until the seal of the city had been affixed thereto by the clerk of the common council under its authority.

I do not recognize the force of the argument which was made to show that the act of 1883 is in conflict with the constitution of this state. The defendant, the Fulton Market Fishmongers' Association, was incorporated by chapter 277 of the Laws of 1869, and by section 3 of said act the commissioners

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of the sinking fund of the city of New York were authorized to lease to the said corporation the present fish market, including one-half of the piers adjoining the same on either side thereof, &c., * * * for a term not exceeding ten years, &c., * * * and providing for the construction of such new building for a fish market of iron or wood, as they may deem advisable, without delay, provided, nevertheless, that such lease shall be for the benefit of all persons now holding stands in the said fish market to the same extent that they now hold the same, who shall become members of the corporation created by this act, which they are hereby authorized to do, within three months after the passage of this act, and further provided that the said new market shall be subject to the laws, ordinances and regulations of the corporation of New York relating to public markets not inconsistent with the purposes of this act; and further provided that such lease shall be accepted by the said corporation within three months after the passage of this act.

Pursuant to that act a lease was executed by the commissioners of the sinking fund for the term of ten years to the defendants. When that lease expired in 1879 a new lease for ten years was executed by the commissioners of the dock department to the defendants, which is the lease under which this action is brought. By chapter 244 of the Laws of 1882, entitled "An act to insure and increase the supply and disposition of wholesome fresh fish in the city of New York, and to regulate the use of piers numbers 22 and 23, East river," said piers were set apart and devoted exclusively until the 1st of May, 1889, for the purposes of fresh fish commerce, and the use of vessels engaged in such business.

That act provided also that such person or persons as now lease or may hereafter lease the same from the mayor, aldermen and commonalty of such city shall be authorized to erect and maintain, &c., * * * such improved structures, &c., * * * as may be necessary and proper to preserve fresh

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food fish for supply of the public, and for the more convenient disposition and care of the same.

It was further provided that the plans for such structures, &c., should be first submitted to the board governing the department of docks for their approval, and that the same should not be erected, &c., unless approved of by said board.

There can be no doubt of the power of the legislature to regulate the use of piers and wharves in the city of New York, although the same are the property of the corporation (*see Vanderbilt agt. Adams, 7 Cowen, 348; see also the Matter of the Application of the Union Ferry Company, 98 N. Y., 139, and remarks of RAPALLO, J., at pages 156 and 157*).

I cannot see that chapter 412 of the act of 1883, which amends chapter 277 of the Laws of 1869, authorizing the commissioners of the sinking fund to grant the new lease, which is relied upon by the defendants, conflicts with the provisions of the constitution.

The legislature, after the act of 1869 was passed, transferred to the dock department the power to make the lease which was made in 1879, and the same authority which conferred such power upon the dock department could take it from them and retransfer it to the commissioners of the sinking fund.

The act of 1883 was also in harmony with the provisions of section 102 of the charter of 1873, so far as it related to market property, and it was quite competent for the legislature to extend to the commissioners of the sinking fund the same power in respect to the sale of leasing wharf property belonging to the city. Nor can I see that said acts in any way violate the corporate rights of the city of New York.

The commissioners of the sinking fund are corporate officers quite as much as the members of the common council, and it is for the legislature to determine, in the exercise of its discretion, upon what officers of the municipality certain powers shall devolve. In this case the legislature, for purposes which we must assume were legitimate, have seen fit to vest the determination of the question whether a surrender of the old lease and

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the making of a new one to the defendants would be for the interest of the city in the commissioners of the sinking fund. The rights of the corporation of the city of New York were fully protected by providing that that question should be determined by corporate officers.

As was said by FOLGER, J., in the *Matter of Zborowski* (68 N. Y., 92): "It is in the legislative province to direct in what way, through what board of municipal officers or agents, or by what individual municipal officers, legislative or executive, the power shall be exerted. If it shall be found that the legislature of the state has enacted that this power shall be placed in the hands of a single officer, as the commissioner of public works, it is not to be said that this is a derogation from the chartered powers and privileges of the city of New York, so often confirmed to it, but only another mode for the exercise thereof, devised by the wisdom or the will of the legislature."

The learned judge, in a previous part of the opinion, had stated "that the general power given by the Montgomerie charter may be curtailed or controlled by legislative action is recognized by this court" (see, also, *The People ex rel. Cox agt. Special Sessions*, 7 Hun, 214).

That the legislature has the power to regulate the taking or making of leases of real estate by the corporation of the city of New York has also been decided in actions relating to that subject (see *Schanck agt. The Mayor, &c., of the City of New York*, 69 N. Y., 444, and *People ex rel. Schanck agt. Green*, 64 *id.*, 499).

The evidence in this case shows that the commissioners of the sinking fund, under the power vested in them by the act of 1883, duly authorized the execution of the lease relied upon by the defendants, on condition of the surrender of the then existing lease by the defendants, and of the execution of the new lease by them. It also discloses that the lease having been approved by the counsel to the corporation, was executed by the defendants and also by the mayor of the city of New York, and that the defendants have surrendered, so far as they were

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able, the old lease, by delivering the same to the counsel of the corporation, who has delivered it to the comptroller.

As I regard the act of 1883 as entirely constitutional and valid, it is only necessary for me to notice one other objection raised by the plaintiffs upon the trial.

It was contended that because the clerk of the common council had failed to affix the seal of the city to the new lease, and because his signature had not been given thereto, the lease was incomplete and constituted no bar to the maintenance of this action.

It seems only necessary, in answer to that objection, to refer to the opinion given by the counsel to the corporation to the commissioners of the sinking fund on the 9th day of August, 1884, which is submitted with his brief.

In that opinion the learned counsel arrives at the conclusion, and so advises the commissioners, that the clerk of the common council should sign any leases made by lawful authority, and that he should affix the seal of the city to all such leases, as he is made by section 76 of the consolidation act the custodian of such seal, and his signature is thereby required to be affixed to all leases made by the city.

It was, therefore, the duty of the clerk of the common council, after the lease in question had been directed to be made by the commissioners of the sinking fund, and the same had been executed by the mayor, to affix his signature and the seal of the city to the same. That he has not done so cannot alter the contract into which the city has entered with the defendants.

It is true that by a proper proceeding the clerk might be compelled to sign said lease and affix such seal. But as the defendants have done everything in their power to carry out their contract with the city, it does not rest with the plaintiffs to assert that the old contract, which was abrogated by the new, is still in force in consequence of the wrongful act or insubordination of their own agent.

For these reasons, I am satisfied that the defendant in the first action is entitled to a judgment dismissing the complaint,

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with costs. So far as the second action is concerned, it is clear that Storer and his associates acted in a representative capacity for the stand owners in the fish market, and that such rights as they acquired by the purchase or bid of April 25, 1882, were duly vested in the Fulton Market Fishmongers' Association by the assignments dated July 6, 1882, by which Lamphear and Lynch assigned their interest in the bids to Storer, and Storer assigned his interest to the Fulton Market Fishmongers' Association.

It is, I think, evident that the legislature, in passing the act of 1883, had in contemplation not only the property leased to the Fishmongers' Association, but also that which had been bid for by Storer and others.

This is clear from the fact that the property held by the Fishmongers' Association only ran to and included the slip and part of the waters, &c., from the centre of pier number 22 to and including the centre of pier number 23, with the bulkhead between the same; Storer and his associates had acquired the right to the outer portions of said piers, that is from the centre to the ends.

The act of 1882 sets apart the whole slip for the whole distance of said piers in length from the bulkhead for the sale of wholesome fresh fish. The act of 1883 authorized a lease to the said corporation of the present fish market, including one-half of the piers adjoining the same on either side thereof for the whole distance in length from the bulkhead of said slip, &c., thus embracing not only that part of the piers and slip already held by the Fishmongers' Association under its lease, but also that part of the same acquired by Storer and others under the sale of April 25, 1882, and assigned by them, as we have seen, to the Fishmongers' Association on the 6th of July, 1882.

It follows, therefore, that the complaint in the second action should also be dismissed, with costs.

Findings may be settled on five days' notice.

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COURT OF APPEALS.

EVANS and others agt. BACKER and others.

Practice—Rule 2, supreme court—Omission of attorney's address—Effect of—Code of Civil Procedure, section 1809.

The omission of an attorney to indorse upon papers served or filed his post-office address or place of business, as required by rule 2 of the supreme court, is a mere irregularity, and entitles the party served either to return the paper or move to set it aside; but after receiving it without objection, he cannot safely disregard the functions which the paper is designed to perform.

Section 1089 of the Code of Civil Procedure requires a notice of ten days of entry of judgment before bringing an action against the sureties on appeal; but if such notice, without the indorsement of the attorney's address is accepted by the opposing attorney, and not returned, he waives the defect, and cannot afterwards defeat such action by pleading that the required notice has not been given.

Decided January, 1886.

E. C. Sprague, for appellants.

George Wing, for respondents.

RUGER, C. J.—The omission to indorse upon papers served or filed the post-office address or place of business of the attorney serving them, as required by number 2 of the supreme court rules, is a mere irregularity, and does not necessarily vitiate either the paper or its service (*Clapp agt. Graves*, 26 N. Y., 418). Such omission entitles the party served either to return the paper or move to set it aside; but he cannot, after receiving it, without objection, safely disregard the function which the paper is designed to perform. In *Kelly agt. Sheehan* (76 N. Y., 325), this court held that an omission to make such indorsement upon a notice of the entry of judgment, which was intended to limit the right of appeal, rendered it ineffectual for that purpose. It was there held that a notice upon which it was

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intended to build a claim for a penalty or forfeiture, must be regular in every respect, and that in such case the party would be held to strict practice. The reason of this decision is quite obvious, and does not require the extension of its principle to cases not within its spirit. In *Kilmer agt. Hathorn* (78 N. Y., 230), the objection was described as a technicality, and its use in that case was justified upon the ground that it defeated a point equally technical raised by the adverse party. The case of *Rae agt. Beach* (76 N. Y., 165) is not an authority on the point. The notice in that case did not give the information which is expressly required by statute as the condition of the maintenance of the action, viz., the entry of the order or judgment.

The supreme court rule in question does not prescribe the consequence or penalty for a violation of its requirements. It is peculiarly the province of the body framing them to interpret its own enactments, and, as a general rule, we have considered it the office of the supreme court to construe and administer its own regulations, and, in their discretion, to impose such penalties and relieve from such defaults as may have been incurred by attorneys through neglect to comply with their modes of procedure (*Martine agt. Lowenstein*, 68 N. Y., 456). In the exercise of their office they have determined, in this case, that the omission to comply with rule 2 was a mere irregularity, capable of being waived, and not affecting the object intended to be accomplished by the service of the notice in question. We are not disposed to disturb their decision of the question.

Of course, the requirement of ten days' written notice of the entry of judgment, or order affirming a judgment, provided by section 1309 of the Code of Civil Procedure as the condition of an action against the sureties upon an undertaking on appeal, is fundamental, and cannot in any essential particular be safely disregarded. But this requirement has been fully complied with in this case, and the attorney has been informed of every particular contemplated by the statute. The notice served

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satisfied its object and fully performed the office designed for it, and there is no justice in saying, because the attorney has disregarded a rule intended solely to promote the convenience of the opposite attorney, and having no reference to the object of the notice, that, therefore, a meritorious action, commenced and prosecuted in strict conformity to the statute giving it, shall be defeated. It would be a perversion of its object and design, and contrary to established rules of interpretation, to give it the construction claimed by the appellant. As was said in *Rea agt. Beach (supra)*, the notice being required by statute, it is not competent for the attorney to waive a compliance with it. The rule, however, being intended for the benefit of the attorney alone, there is no reason why he may not waive its performance, and by accepting and retaining the notice we think he has done so.

The fact that the defendants are sureties works no change in the aspect of the question. Their covenant was to perform their undertaking upon condition that the judgment appealed from was affirmed, and the attorney for the appellant should have ten days' written notice of its entry before action brought. These conditions have been strictly complied with, and they are not entitled to claim the benefit of a rule not designed for their protection, and in the application of which they are not interested.

We have found no case in this court conflicting with the determination of the general term, and we think it conforms to the real meaning and intent of the rule in question. The order of the general term should therefore be affirmed, and judgment absolute ordered for the plaintiff.

All concur, except MILLER, J., absent.

Conklin agt. White.

CITY COURT OF NEW YORK.

EDWARD T. CONKLIN, respondent, agt. ANNIE S. WHITE,
appellant.

Landlord and tenant — Right of landlord to recover rent for the month where the tenant left the premises on the first day, after a demand and refusal.

In an action by a landlord to recover rent from a tenant for the month of November, under a written lease providing for the payment of rent in advance on the first of each and every month, and upon the rent for November being demanded of her on the first day she refused to pay, and on the afternoon of the same day she personally left the house, but her sub-tenants continued in possession. The tenant claims that the character of the house was bad, though represented to her differently at the time she leased it.

Held, that the tenant was liable for November rent.

Where the landlord has not accepted a surrender of the premises or exercised dominion over them by virtue of any abandonment and surrender until after the rent became due, the tenant is not, and hereby relieved from the payment of rent already accrued.

Where the defendant admitted having discovered in the month of June, 1884, the bad character of the house :

Held, that as she then knew that the representations made to her were false, it was her duty to affirm or disaffirm the contract ; but having kept the house until the first day of November, and paid the rent in full until that time, she did not exercise her election of rescinding the contract within a reasonable time, and is therefore liable for November rent.

General Term, February, 1886.

Before HYATT and HALL, JJ.

APPEAL from a judgment rendered at trial term on a verdict of a jury by direction of the court.

Frank J. Dupignac, appellant's attorney.

James Flynn, respondent's attorney.

HYATT, J. — This is an action to recover from the defendant

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certain rent for the month of November, 1884, under a written lease. It appears from the uncontradicted evidence in the case that on June 20, 1884, the plaintiff leased to the defendant a furnished dwelling-house in this city, for the term of ten months and seven days, on June 24, 1884, at the yearly rent of \$3,900, payable in equal monthly payments, in advance, on the first day of each and every month thereafter. On that day the defendant went into possession, and continued therein, paying her rent monthly in advance, on the first day of every month, until the first day of November, when, on demand being made upon her by the plaintiff for that month's rent, she refused to pay, and afterwards in the afternoon of the same day she personally left the house, *but her sub-tenants continued in possession*. The action is for that month's rent.

It must be assumed as a fact in this case that the defendant, who is a respectable woman, hired the house as a respectable house, and therefore the contract was not illegal in its character.

There is no evidence that the landlord accepted a surrender of the premises or exercised dominion over them by virtue of any abandonment and surrender *until after the rent became due*. In such cases it is well established law that the tenant is not thereby relieved from the payment of rent *already accrued*. In this case the rent claimed herein was payable in advance on the first day of November.

The defendant admits having discovered, in the month of June, 1884, the bad character of the house. She then knew that the representations made to her were false. It was her duty then to affirm or disaffirm the contract; but having kept the house until the first day of November, and paid the rent in full until that time, she did not exercise her election of rescinding the contract within a reasonable time, and therefore is liable for November's rent. She must act promptly. She was not at liberty to hesitate and balance advantages (*Carhart agt. Ryder*, 11 *Daly*, 101; *Schiffer agt. Dietz*, 83 *N. Y.*, 300).

The judgment must be affirmed, with costs.

Butler agt. Jarvis, Jr.

COURT OF APPEALS.

In re BUTLER agt. JARVIS, Jr.

Actions—Discontinuance of—Right of plaintiff to discontinue.

Where an action was begun in the court of common pleas by plaintiff as ancillary administrator of a lunatic, against the committee of such lunatic for an accounting, and before trial entered an *ex parte* order of discontinuance on payment of costs, which was vacated by the court, and a motion to discontinue also denied, on the ground that the plaintiff intended to commence an action in the supreme court, and would harass defendant:

Held, error; that, ordinarily, a suitor has a right to discontinue any action or proceeding commenced by him, and his reasons for so doing are of no concern to the court.

Decided, January, 1886.

H. W. Bookstaver, for respondent.

Stephen A. Walker, for appellant.

FINCH, J.—Ordinarily, a suitor has a right to discontinue any action or proceeding commenced by him, and his reasons for so doing are of no concern to the court. A party should no more be compelled to continue a litigation than to commence one, except where substantial rights of other parties have accrued, and injustice will be done to them by permitting the discontinuance. In such a case, through the control which the court exercises over the entry of its order, there is discretion to refuse; but where there are no such facts, and nothing appears to show a violation of the right or interest of the adverse party, the plaintiff may discontinue, and a refusal of leave becomes merely arbitrary, and without any basis upon which discretion can exist (*In re Anthony St.*, 20 Wend., 618; *Carleton agt. Darcy*, 75 N. Y., 377).

In this case the defendant was appointed by the court of

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common pleas, on July 20, 1870, committee of Bomanjee Byramjee Colah, a lunatic, and took possession of his property. Up to the death of Colah, that court retained exclusive jurisdiction over the committee and the estate in his hands. But the lunatic, whose place of residence was in Bombay, died while in New York and under the ward of the court, and the appellant was duly appointed ancillary administrator of his estate. As such administrator, he commenced, in December, 1882, a proceeding by petition in the common pleas to settle the accounts of the committee, and obtain the property remaining. This proceeding went so far as the entry of an order of reference, but no further proceedings were ever taken under it. At this point the administrator entered, *ex parte*, an order of discontinuance on payment of costs, which was vacated by the court, and thereupon, moving for leave to discontinue, his request was refused. We can discover no reason for the refusal upon which discretion could operate. Two only are suggested. It is shown that, after the entry of the first order, the administrator began an action in the supreme court to settle the accounts, and it is said that the latter court had no jurisdiction, and that the control of the common pleas survived the death of the lunatic, and the termination of the committee's office (*Code Civil Proc.*, sec. 2320). That is a question of law. The administrator had a right to raise it, and could only do so by bringing his action in another court. By that process it may properly come before us if necessity should require it, but it has no place on a motion to discontinue. If the opinion of the common pleas on that question of law furnished a basis for the exercise of discretion, the administrator cannot bring the question into the court for decision. It ought not to be decided on a mere motion for leave to discontinue, and should have been left to some suitable occasion. It is further said that the new action "harasses" the defendant unnecessarily. We cannot see how. All costs of the discontinued proceedings are to be paid, and have been tendered. The defendant acquired no new rights. He is left precisely in the position he would have

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been in if the proceeding in the common pleas had never been commenced, and the action in the supreme court alone had been brought. Would that action have unnecessarily "harassed" him? We can see no just basis for the refusal of leave to discontinue upon which any discretion was called into exercise or could operate.

The orders of the special and general terms should be reversed and the motion for leave to discontinue should be granted. No costs are allowed on this appeal.

All concur, except MILLER, J., absent.

NEW YORK SUPERIOR COURT.

THE NATIONAL CITIZEN'S BANK OF NEW YORK agt. GEORGE HOWARD.

Checks and bills—Bona fide holder—What must be shown to constitute—Agency—When post-office not the agent of the person to whom negotiable paper is sent.

Upon a deposit being made by a depositor in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or drafts or checks is immediately vested in and becomes the property of the bank.

It is a fraud upon a depositor for a bank or banker to permit a depositor, in reliance upon the supposed solvency of the bank, to make deposits after it has become irretrievably insolvent, and such insolvency was known to the bank or its agent, and upon the discovery of the fraud the depositor may rescind the contract and reclaim the check or draft deposited, unless such check or draft has come into the possession of a *bona fide* holder for value.

A person claiming to be a *bona fide* holder of a negotiable instrument must show under what circumstances the instrument came into his possession, and to establish his title to the instrument he must show the consideration he paid for it.

Where the defendant, late on the seventh of November, deposited the check in suit with M. & Co., bankers at Mt. Vernon, and after business hours said check was deposited by M. & Co. in the post-office, to be sent to—

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plaintiff for payment of check of M. & Co., paid that day by plaintiff, on M. & Co.'s promise to make a deposit before the bank opened on the following morning.

Held, that plaintiff had no right to the check or its *proceeds* as against the defendant.

The mere fact that M. & Co. had promised to make good or pay any indebtedness of his to plaintiff, and that the plaintiff relied on such promise, would not be sufficient to constitute the plaintiff a *bona fide* holder for value.

The post-office was used as a messenger of M. & Co. to make the deposit, and not as the agent of the bank in receiving it.

Special Term, April, 1886.

H. P. Allen and John L. Hill, for plaintiff.

Charles C. Bigelow and Michael H. Cardozo, for defendant.

INGRAHAM, J.—The case of *Cragie* agt. *Hadley* (90 N. Y., 133), disposes of two of the questions involved in this case. They are, first, that upon a deposit being made by a depositor in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or drafts or checks is immediately vested in and becomes the property of the bank; and, second, that it is a fraud upon a depositor for a bank or banker to permit a depositor, in reliance upon the supposed solvency of the bank, to make deposits after it has become irretrievably insolvent, and such insolvency was known to the bank or its agent, and that upon the discovery of the fraud the depositor may rescind the contract and reclaim the check or draft deposited, unless such check or draft has come into the possession of a *bona fide* holder for value.

Applying these rules, I think the title to the check in suit passed by the deposit to Masterton & Co., subject, however, to the right of the defendant to reclaim it on discovery of the fraud practiced on him, unless it had come into the possession of a *bona fide* holder for value.

It appears by the evidence that on the seventh of November Masterton & Co. was indebted in an amount exceeding in the

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aggregate \$100,000, with assets which have realized \$26,000 or \$27,000; that as early as the 4th of November, 1885, Masterton spoke of making an assignment, and on the sixth of November he asked judge GIFFORD to become the assignee. The deposit was made late in the day of the seventh of November, and in the evening of that day the assignment was made.

The acceptance of the deposit under such circumstances constitutes such a fraud as entitled the depositor to reclaim the deposit on the discovery of the fraud (*Cragie agt. Hadley, supra; Anonymous*, 67 N. Y., 598).

The only question remaining is whether the evidence established that plaintiff became a *bona fide* holder of the check for value.

A person claiming to be a *bona fide* holder of a negotiable instrument must show under what circumstances the instrument came into his possession, and to establish his title to the instrument he must show the consideration which he paid for it (*First National Bank agt. Green*, 43 N. Y., 801; *Ocean National Bank agt. Carl*, 55 *id.*, 440).

And in *McBride agt. The Farmers' Bank* (26 N. Y., 457), it was held "that before the holder of the note can acquire a better title to it than the person from whom he received it, he must pay a present valuable consideration therefor, and that receiving it in payment of or as security for an antecedent debt it is not such a consideration. That because such a party had omitted to collect the balance due him by reason of expectation or promise of payment, he did not part with or pay any valuable consideration for the note, and if he fails to collect the note he is in no worse situation legally than he was before receiving it."

The plaintiff in this case, to sustain his claim to the check in question, must, therefore, show that he paid for the check in suit a present valuable consideration, or lost some right on the faith of the check itself. The mere fact that Masterton & Co. had promised to make good or pay an indebtedness of his to

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plaintiff, and that the plaintiff relied on such promise, would not be sufficient to constitute the plaintiff, under the authorities cited above, a *bona fide* holder for value.

The facts in this case show that the check in controversy was deposited by Masterton & Co. in the post-office of Mt. Vernon after the close of business hours on the 7th of November; that prior to that time the plaintiffs had paid all the checks drawn by Masterton & Co. on it, which constituted the claim of the bank against them, and that the time had expired within which they could have returned the checks paid by them through the clearing house. Such checks had been paid relying on the promise of Masterton & Co. to make a deposit before the bank opened on the following morning, and not on the credit of any particular check. Plaintiff had no knowledge of the existence of this check in suit, or in fact that Masterton & Co. had any check on the 7th of November with which they could carry out their promise. It cannot be said under any circumstances that any title to the check passed to the bank until it was deposited in the post-office at Mt. Vernon. If Masterton & Co. had not deposited the check, plaintiff could not have recovered it from the assignee; and as it was not deposited until after the bank closed, plaintiff would be in exactly the same condition, if he fails to recover in this action, as he would have been if the check had not been sent to the plaintiff at all. It can make no difference, therefore, whether the post-office is to be considered the agent of the plaintiff or Masterton & Co.

There is a marked distinction, however, between this case and the cases cited by the plaintiff, holding that the post-office was the agent of the person to whom a paper had been sent. As it appears here, the post-office was used as a messenger of Masterton & Co. to make the deposit, and not as the agent of the bank in receiving it, it could hardly be claimed under the circumstances in this case that if the check had been lost in the course of its transmission from Mt. Vernon to New York that

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the plaintiff would suffer, and yet that would be the result if the deposit in the mail was a delivery to the plaintiff.

The state of the account between plaintiff and Masterton & Co., at the close of business on the 7th of November, was an indebtedness of Masterton & Co. to the plaintiff which Masterton & Co. had promised to pay by a deposit before the opening of the bank on the 8th, and the delivery by Masterton & Co. of the check in payment of such an indebtedness and in pursuance of such promise did not make the plaintiff a *bona fide* holder for value of the check delivered to them.

It follows, therefore, that the plaintiff had no right to the check or its proceeds against the defendant, and the defendant is entitled to judgment, with costs.

CITY COURT OF NEW YORK.

SARGENT agt. BENNETT.

Supplementary Proceedings—Police pension fund—Moneys received from such fund by a widow of a Policeman, cannot be reached by supplementary proceedings.

Moneys received by the widow of a policeman from the police pension or insurance fund, cannot be reached by a judgment creditor on supplementary proceedings, instituted either before or after the money reaches her hands.

The police pension or insurance fund is in the nature of a trust, expressly authorized by statute for the benefit of widows and orphans, and as the funds proceed from persons other than the judgment debtor, and are intended for the support of the beneficiaries, they cannot be directed by means of this proceeding and turned over to creditors.

Special Term, May, 1886.

MCADAM, C. J. — Moneys received by the widow of a policeman from the police pension or insurance fund (*Consolidation*

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Act, secs. 303-309; Laws 1885, chap. 364), cannot be reached by a judgment creditor on supplementary proceedings, instituted either before or after the money reaches her hands. The exemption does not arise under the federal or state statute in regard to pension money paid by the government (*U. S. R. S., sec. 4747; Code, sec. 1393*), but under the general statute providing that the income of a trust estate created by a person other than the beneficiary cannot be reached at law (3 *R. S. [6th ed.]*, 190, *sec. 55*; 35 *N. Y.*, 361; 5 *Hun*, 425). The term estate, as used in the statute, includes personalty as well as realty. If such income be greater than is necessary for the support of the widow, the surplus can only be reached by a bill in equity where the issue is directly made upon the amount necessary for the debtor's support, but the title to such surplus cannot pass to a receiver in supplementary proceedings, and must be reached by bill filed by the creditor (31 *N. Y.*, 9; 70 *id.*, 270; 5 *Hun*, 425; 19 *id.*, 500).

The police pension or insurance fund is in the nature of a trust, expressly authorized by statute for the benefit of widows and orphans, and as the funds proceed from persons other than the judgment debtor, and are intended for the support of the beneficiaries, they cannot be directed by means of this proceeding and turned over to creditors. The defendant may, however, state the amount she receives from the fund, so that the court may intelligently determine whether, and to what extent, her other property or income is liable to these proceedings.

The parties must govern themselves accordingly.

Constant *et al.* agt. The American Baptist Home Mission Society.

NEW YORK SUPERIOR COURT.

MARY T. CONSTANT, as executrix, and S. VICTOR CONSTANT and others as executors, &c., of SAMUEL S. CONSTANT, deceased, agt. THE AMERICAN BAPTIST HOME MISSION SOCIETY, impleaded, &c. (three cases).

Mortgages—Unrecorded mortgages—Who is a subsequent mortgages in good faith, and for a valuable consideration—When party cannot claim the benefit of the recording act.

A gave three mortgages to C, through D, the latter's attorney, for moneys loaned, one dated October 2, 1882, and the other two dated February 17, 1883. The attorney, D, handed the bonds to C, and retained the mortgages for record. He caused the first mortgage to be recorded, but the last two were never recorded. On September 18, 1883, A executed a bond and mortgage to the American Baptist Home Mission Society upon the property covered by C's recorded mortgage. On January 11, 1884, he executed mortgages to the same society upon the property covered by C's unrecorded mortgages, which mortgages to the society were recorded. Mr. D, the attorney for C, was also an officer of, and counsel for, the society. It was for funds of the society in his hands and chargeable to him for reinvestment that he undertook to turn into the society the bonds and mortgages referred to. A few months thereafter he made an assignment for his creditors:

Held, that as against C, the relation between D and the society was that of debtor and creditor, and the taking of the bonds and mortgages for D's antecedent debt did not constitute it a mortgage for a valuable consideration, so as to be entitled to take advantage of the fact that its mortgages were first duly recorded. The claim that C being also an officer of the society should have prevented D from acting as he did, and that his executors were, therefore, estopped from enforcing their mortgages against the society is not tenable, C's rights having accrued before any wrong was perpetrated upon the society.

Special Term, May, 1886.

Thornall, Squires & Constant, for plaintiffs.

John E. Parsons, of counsel.

Edward S. Clinch, for defendants.

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FREEDMAN, J. — The three bonds and mortgages upon which the actions were brought were duly executed and acknowledged by Elizabeth Meehen and Hugh Meehen, her husband, to secure the payment of the sums named therein. These sums they received as loans from Mr. Samuel S. Constant through Mr. Deane, who acted as Mr. Constant's attorney and counsel in the transaction. The date of the first bond and mortgage is October 2, 1882, and the other two are dated February 17, 1883. The papers were duly delivered to Mr. Deane, who handed the bonds over to Mr. Constant, and retained the mortgages for record. This, in law, constituted a complete delivery to Mr. Constant, and thereupon Mr. Constant's right to enforce the same became fixed. If he is to be deprived of it, it must be done by reason of something which occurred afterwards. There is no evidence that he ever received payment.

It appears, however, that Deane caused only the first mortgage to be recorded; that the other two were never recorded, and that he had authority to determine whether or not they should be recorded. Although in the matters stated he acted as the attorney and counsel of Mr. Constant, he was, at the same time, extensively engaged in real estate speculations on his own account, from some of which Mr. Constant indirectly received some benefit. Mr. Deane loaned Mr. Constant's money to the Meehens to be used in the erection of buildings, and the mortgages taken were temporary or so-called builders' mortgages, which were intended to be paid off and to be replaced by others of larger amounts, whenever the buildings were so far advanced that a permanent loan could be obtained on them. This accounts for Mr. Deane's failure to record two of the mortgages referred to. But whatever the reason was, no person could take advantage of it as against Mr. Constant, except a subsequent purchaser or mortgagee in good faith, and for a valuable consideration, whose conveyance or mortgage, was first duly recorded.

On or about September 13, 1883, the Meehens executed a bond and mortgage to the American Baptist Home Mission

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Society upon the property covered by Mr. Constant's recorded mortgage. On January 11, 1884, they executed mortgages to the same society upon the property covered by Mr. Constant's unrecorded mortgages. The execution of these three mortgages, with the bonds belonging thereto, was procured by Mr. Deane, who sent the bonds to the society at once, and the mortgages as soon as they were recorded.

The main question, therefore, is whether, as against Mr. Constant, the said society is a subsequent mortgagee in good faith and for a valuable consideration, whose mortgage was first duly recorded.

As to Mr. Constant's recorded mortgage, this question must be at once decided in the negative. Some independent considerations of an alleged equitable character which are claimed to affect the enforcement of this mortgage just as much as they are claimed to affect the enforcement of the unrecorded mortgages, I shall hereafter consider.

As to Mr. Constant's unrecorded mortgages, it becomes important to notice the relation which Mr. Deane occupied towards the society. He was a member of the executive board from May, 1878, to May, 1885, a member of the finance committee from June, 1878, to May, 1884, and the counsel of the society from September 13, 1880, to June, 1884. As such counsel it was his duty to examine titles on investments made by the society.

In the regular course of events, therefore, Mr. Deane would have examined the title of the Meehens, and, if found all right, he would have procured the money from the society. He would then have used so much of it as was necessary to pay Mr. Constant and satisfy his mortgages, and paid the residue over to the Meehens. But all which was done was that under date of January 11, 1884, a statement was prepared for Mr. Deane by Mr. Squires, who attended to that kind of business for him, which showed the amount due to Mr. Constant on his unrecorded mortgages, that the Meehens gave a receipt for the amount "as per statement," i. e., for so much money not received

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by them, but to be used to satisfy Mr. Constant's mortgages; that satisfaction pieces were prepared, and that thereupon the Meehan bonds and mortgages were sent by Mr. Deane to the society, the bonds at once, and the mortgages when recorded. Nothing was paid to the Meehens, nothing was paid to Mr. Constant and nothing was paid by the society at the time or at any time afterwards. The satisfaction pieces were not executed. Mr. Constant was not even informed of the matter. For months afterwards he kept inquiring of Mr. Deane whether the latter had not yet found anything for the mortgages.

The explanation for all this is that for a long time prior thereto the society had entrusted Mr. Deane with the investment of its funds, and its committees had not exercised that supervision over his acts which should have been exercised, so that Mr. Deane could and did invest the funds of the society pretty much as he pleased. When a mortgage which the society held was paid to Mr. Deane, and this happened quite frequently, he applied to the society for the execution of a satisfaction piece, and the paper was executed by some of the officers of the society and handed to him, together with the bond and mortgage, for delivery to the party entitled thereto, but the amount received by him remained in his hands until he saw fit to reinvest it, and return a bond and mortgage for it. It was for funds thus chargeable to him for reinvestment, and which had been in his hands for some time, that he undertook to turn into the society the bonds and mortgages referred to. He was at the time heavily embarrassed in his real estate speculations, and without doubt sent to the society the said bonds and mortgages in order to stave off investigation. A few months thereafter he failed and made an assignment for the benefit of his creditors.

Under these circumstances it is difficult to see how the society can claim the benefit of the recording act. As against Mr. Constant the relation between Mr. Deane and the society was that of debtor and creditor. The taking of the bonds and mortgages for the antecedent debt of Deane did not constitute

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it a mortgage for a valuable consideration within the meaning of the statute (*R. S* [6th ed.], vol. 2, p. 1138, sec. 1), for it parted with nothing on the faith of the mortgages (*Delaney* agt. *Stearns*, 66 *N. Y.*, 157; *Bank for Savings* agt. *Frank*, 45 *Supr. Ct. R.*, 404). Nor was there any representation made that the mortgages were first mortgages. But the society is not even a mortgagee in good faith, for, under the circumstances of this case, the society as principal must be deemed to have had the same knowledge concerning the rights of Mr. Constant which Mr. Deane possessed as its attorney. Whatever benefit the society might claim under other circumstances under the rule as laid down by me in *Dillon* agt. *Sixth Ave. R. R. Co.* (48 *Supr. Ct. R.*, 283; *affirmed* 97 *N. Y.*, 627) cannot be accorded to it by reason of the fact that contemporaneously with the execution of the bonds and mortgages by the Meehens to the society, and for the purpose of ascertaining the precise amount to be paid or credited to the Meehens upon the basis that the amounts of said bonds and mortgages were to be treated as loans from the society, Mr. Deane procured Mr. Squires to make out the statement which showed the amount due to Mr. Constant. Now, it may well be that Mr. Deane personally did not see this statement until the day after the loan to the Meehens was closed between them and Mr. Squires on paper. But this is immaterial, because Squires acted for Deane, and the whole transaction remained a transaction on paper, the Meehens receiving nothing, Constant receiving nothing and the society parting with nothing, and because Deane, beyond doubt, had personal knowledge of the whole transaction and of the contents of the statement before the bonds and mortgages were transmitted to and received by the society. The information thus obtained by Mr. Deane was, therefore, information acquired by him in the very course of the business of the society and as its attorney. The result is that upon this point the case falls within the rule as stated in *Bank of the United States* agt. *Davis* (2 *Hill*, 451); *Ingalls* agt. *Morgan* (10 *N. Y.*, 178); *Dillon* agt. *Anderson*, (43.

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N. Y., 231); *The Distilled Spirits* (11 Wall, 356); *The Bank for Savings* agt. Frank (45 Supr. Ct. R., 404); *Kendall* agt. Niehbur (45 Supr. Ct. R., 542); *affirmed* (46 Supr. Ct. R., 544, and 87 *N. Y.*, 1). Moreover, at that very time Mr. Deane was not only the attorney of the society, but also a member of its executive board and of its finance committee.

There remain to be noticed the considerations of an equitable character to which I referred in the beginning, and on account of which it is claimed Mr. Constant and his executors are estopped from enforcing their mortgages against the society. They rest on the fact that Mr. Constant, at the times hereinbefore referred to, was a member of the finance committee of the society and chairman of its executive board, and upon this it is claimed that it was his duty to prevent Mr. Deane from acting as he did. The answer to all this is that Mr. Constant's rights had accrued before any wrong was perpetrated upon the society; and that, even if he had known of the intention of Mr. Deane to give to the society the mortgages which were turned over, and had acted as the society claims he should have acted, the society would not have received the mortgages at all, and Mr. Deane would have remained indebted to the society precisely as he then was. The position of the society would not have been improved in the least by such action, and consequently it was not harmed by Mr. Constant's omission to act. Its loss was complete when it released previous mortgages without compelling Mr. Deane to pay over the proceeds collected by him. The only risk Constant did run was as to his unrecorded mortgages, and that was the penalty imposed by the recording act in favor of subsequent purchasers or mortgagees in good faith and for a valuable consideration, whose conveyances or mortgages might have been first duly recorded.

An equity is also claimed to arise from the fact that the society foreclosed its mortgages, purchased at the foreclosure sale and made a contract to finish the buildings. There is nothing in this claim. These things were done when Mr. Constant was no longer an officer, nor even a member of the society,

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and while the society stood, for the reasons hereinbefore stated, chargeable in law with notice of Mr. Constant's rights even if the contracts were not made after the filing of the notices of the pendency of the present actions.

As to the form of the complaints I see no reason to change the views expressed by me on the trial. There is no statute, rule or practice requiring that the complaint for the foreclosure of a mortgage shall contain special allegations as to defendants who are or claim to be subsequent lienors, and there is no difference in method between the foreclosure of an unrecorded and that of a recorded mortgage, except that under rule 63, an unrecorded mortgage must be filed with the clerk before the execution of the sheriff's or referee's deed on a sale under the judgment of foreclosure. As both the plaintiffs and the society claim under mortgages executed by the Meehens, and the mortgages of the plaintiffs are first in date, the controversy does not present a question of paramount title, but only the question whether plaintiffs' mortgages are really what they purport to be, viz., first liens.

The plaintiffs are entitled to the usual judgment of foreclosure and sale, with costs, and an allowance in each of the three actions. Except as to matters peculiar to the actions when separately considered, the findings to be handed up for signature should be as they were proposed by the plaintiffs and corrected by me in action No. 1, with the addition of a further finding, which seems to have been overlooked, showing breach of the condition of the mortgage, viz., non-payment and the amount due.

Roberts agt. Warren.

SUPREME COURT.

ROBERT C. ROBERTS agt. EDGAR A. WARREN.

Costs—Several actions for same cause—Effect of one recovery—Code of Civil Procedure, section 8231.

In an action for an assault and battery committed by two defendants, on a motion by defendant for leave to serve supplemental answer setting up the recovery and satisfaction of a judgment against another party for the same cause of action;

Held, that the provisions of section 8231 of the Code of Civil Procedure (for the recovery of but one bill of costs when several actions are brought for the same cause) applies to this class of actions; and plaintiff is not entitled to costs, but only to taxable disbursements which have not been incurred and were not included in the other case.

Oneida Special Term, March, 1886.

MOTION by defendant for leave to serve supplemental answer setting up the recovery and satisfaction of a judgment against another party for the same cause of action. The action being for an assault and battery committed by the two defendants.

H. F. & J. Coupe, for motion.*P. C. J. DeAngelis*, for plaintiff.

MERWIN, J.—The question seems to be as to what costs the defendant should pay as a condition to serving the supplemental answer. The claim of the defendant is that not more than \$10 costs should be imposed. This is on the theory that section 8231 of the Code applies to this class of actions. It was so held in *Quin agt. Bowe* (4 Law B., 72; S. C., 10 Daly, 505).

This provision, or one similar to it in the old Code, section 804, has been in force since 1849, but no direct adjudication is cited except the above. The question was not up in *Mitchell*

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agt. *Allen* (25 *Hun*, 543), nor decided in *Abbott* agt. *Johnstown*, &c., *H. R. R. Co.* (24 *Hun*, 135).

I am inclined to the opinion that the contention of the defendant's counsel is correct and that section 3231 applies. The plaintiff, however, should have any taxable disbursements that he has incurred and that were not included in the other case, and should have leave to discontinue.

An order on this basis may be submitted.

NEW YORK COMMON PLEAS.

DANIEL DONOVAN, plaintiff and respondent, agt. ROBERT G. CORNELL, defendant and appellant.

Arrest—When relation of parties not a fiduciary one and an order of arrest cannot be sustained—Code of Civil Procedure, section 550, sub. 3.

Where a factor mingles the proceeds of sales indiscriminately with his own funds, and by usage pays by his check on Saturday for all merchandise delivered during the week, whether the same were then sold or unsold, the relation of the parties is not a fiduciary one within the meaning of subdivision 3 of section 550 of the Code, but an ordinary one of debtor and creditor, and an order of arrest issued in such a case cannot be upheld.

General Term, May, 1886.

Before LARREMORE, C. J.; DALY and VAN HOESEN, JJ.

THE action was brought against the defendant as commission merchant, to recover the proceeds of sales of sheep and lambs consigned to the defendant by the plaintiff. The case, upon a former appeal, is fully reported in 8 *Civ. Pra. Rep.*, 284.

Horace Secor, for appellant.

J. C. Wolff, for respondent.

LARREMORE, C. J.—When this case was before the general

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term of this court before, it was held that the papers used on the application for the order of arrest did not disclose a cause of action for conversion. It was also held that the city court, at special and general term, erred in deciding to allow a jury to pass upon the question whether a fiduciary relation or one of mere debtor and creditor existed between the parties, and such question was remitted to the city court, to be decided by a judge thereof at special term (*Daily Reg.*, Dec. 22, 1885). The special term of the city court, after hearing the application on the merits, has again refused to vacate the order of arrest; its order was affirmed by the general term of that tribunal, and from such order of affirmance this appeal is taken. The question how far we are bound by the allegations of the complaint as to the theory of the action having been determined on the former appeal, and it having been then decided that a cause of action for conversion is not therein set forth, and that the cause for arrest, if any, is extrinsic to and not identical with the cause of action, it seems clear that this order must be reversed.

Defendant alleges a general custom of the trade of which the plaintiff was aware, and in which he had acquiesced in all dealings between the parties for many years. The factor mingled the proceeds of sales, whenever made, indiscriminately with his own funds, and paid by his check on Saturday for all merchandise delivered during the week, whether the same was then sold or unsold. Plaintiff does not deny the existence of the usage or that his dealings were had in accordance with it. Indeed he expressly admits some of the more important facts averred. The relation of the parties was not therefore a fiduciary one within the meaning of subdivision 3 of section 550, but an ordinary one of debtor and creditor (*Wallace agt. Castle*, 14 *Hun*, 106; *Duquid agt. Edwards*, 50 *Barb.*, 300; *Grover & Baker Sewing M. Co. agt. Clinton*, 5 *Bissell*, 324; *Alliance Ins. Co. agt. Cleveland*, 14 *How. Pr.*, 408). According to the facts alleged in defendant's answer and affidavit, and which are not denied, we think the present case comes within the principle laid down by the court of appeals in *Morris agt. Talcott* (96

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N. Y., 100), and that the order appealed from should be reversed, with costs.

DALY and VAN HOESSEN, JJ., concurred.

SUPREME COURT.

ROSWELL H. ROCHESTER, as receiver, &c., plaintiff, agt. THE MAYOR, ALDERMEN, &c., OF THE CITY OF NEW YORK, and others, defendants.

References—What issues are triable by the court—When reference should not be ordered—Code of Civil Procedure, sections 969, 968, 1013.

Actions to set aside fraudulent conveyances, transfers, releases and settlements should be tried by the court.

Under section 1013 whether to refer or refuse the reference is addressed to the discretion of the court. It is obviously the purpose and theory of the law that equity actions are to be tried by the court.

Even in actions involving the examination of a long account, references are ordered, not as a matter of right or of favor to the parties, but for the convenience of the court, and the court cannot, for its own convenience in such cases, order a reference when there are difficult questions of law involved.

New York Chambers, January, 1886.

Oliver W. West, for plaintiff.

E. Henry Lacombe, counsel to the corporation; Thomas P. Wickes, of counsel.

POTTER, J.—This is a motion upon the part of plaintiff for the appointment of a referee to try the issues in this action.

The effect of the allegations of the complaint, and the relief sought, are essentially of an equitable character.

Those allegations are briefly but substantially these: that in the year 1865, under the authority contained in acts of the legislature for that purpose, the defendant, through certain of

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its officers, entered into a contract with John L. Brown, William H. Devoe and Shepherd F. Knapp for the cleaning of the streets of said city for the period of ten years; that annually from the time of making said contract, the legislature appropriated sums of money to pay for work in cleaning the streets of the city beyond what was required under said contract; that some time in 1869 the said Brown, by assignment of the interest of said Devoe & Knapp, became the sole contractor for cleaning the streets of said city, and with its assent; that in the last named year the said Brown and others formed an association under the laws of the state for cleaning streets of said city under the name of "The New York Street Cleaning Association," and the said Brown thereupon transferred to said association his plant and property for cleaning said streets, and thereafter the work of cleaning said streets was done by said association and with the knowledge and assent of the said city, until June, 1872, and that during the last mentioned period the said association did all the work of street cleaning for said city and received the payment therefor except the sum of \$86,000, which accrued between the 1st day of July, 1871, and the 2d day of October, 1871; that on the 23d day of October, 1871, the bill for said \$86,000 was audited and allowed by the street cleaning commissioners, and the same agreed upon, but the defendant omitted to pay the same; that in 1873 the said Brown commenced an action in his own name to recover said sum. An answer was put in by the defendant and the issue was referred; that during the pendency of the action said Brown died, and his personal representatives were substituted, and that upon the revocation of their letters or appointment, William A. Seaver was appointed special administrator, and the action was thereupon continued in the name of special administrator; that a judgment was rendered in said action for the amount of said claim and interest; that the defendants appealed to the general term from said judgment, and pending the appeal from said judgment, the same was settled and compromised and a satisfaction thereof signed by said administrator was entered of record,

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and the defendants were also released from any claim by reason of said judgment, and the matters therein contained, by said administrator and by Hannah E. Brown and John L. Brown, Jr., individually and as executors, and that subsequently the said Hannah and John were again appointed executors of said Brown, deceased, and were again substituted as plaintiffs in said action; that there has been no order discontinuing said action; that said settlement and payment was fraudulent and void as to the said association, and that the plaintiffs ask as appropriate relief in this action, that said satisfaction piece, and the cancellation and satisfaction of said judgment by the clerk, &c., be set aside and the said judgment be restored and declared in full force and validity, and that said release be also adjudged fraudulent and void and be set aside, and that said claim and the judgment thereupon be declared to belong to said association, and the said defendant adjudged and directed to pay said judgment to the plaintiff as receiver of said association.

It is plain from this statement that there is no occasion for the examination of a long, or of any account, for the claim has been once voluntarily liquidated by the parties to the contract, and subsequently determined by the judgment; and that plaintiff in this action simply seeks to restore said judgment and to be authorized and permitted to enforce it for the benefit of the association. It is not perceived how the examination of a long account can be involved in the trial of the present action. The question would seem to be simply this, whether that judgment was legally paid or satisfied by the satisfaction piece and releases

The plaintiff assumes and asserts that the action, in which the judgment was rendered, was brought in the name of Brown, but for the benefit of the association as the party in interest, and claims to be the owner of the judgment, and as the only party who was authorized to receive payment of it or to compromise it. If the plaintiff is sustained in this respect, the judgment was not legally settled, and the plaintiff is entitled to

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have the judgment restored, subject, perhaps, to the right of prosecuting the appeal by the defendant.

If the plaintiff does not sustain his right to the judgment, then the judgment was legally settled, and plaintiff must be bound by that settlement.

In either aspect, the amount of the claim (if it had not been agreed upon as alleged in the complaint), affixed such judgment, and there cannot be any necessity or occasion, in this action, to investigate the items of the claim.

If the plaintiff, as receiver of this association, had brought his action to recover the claim upon the theory that the action by Brown as an individual was in fraud of the rights of the association, and was fraudulently carried on to judgment and then fraudulently and collusively settled by the defendants and Brown's personal representatives, then the trial would or might involve the items of the claim. But this action is not brought upon any such theory.

It is simply an action in equity to set aside the unauthorized satisfaction and discharge of a judgment which belonged to the association, and not to John L. Brown individually.

This action is properly an action triable by the court and not by a jury as a matter of right (*secs. 968, 969, 1013, Civ. Pra.*). Application is made by plaintiff to refer it, and the defendant resists such application.

Under section 1013, whether to refer or refuse the reference, is addressed to the discretion of the court.

It is obviously the purpose and theory of the law that equity actions are to be tried by the court.

Even in actions involving the examination of a long account, references are ordered, not as a matter of right or of favor to the parties, but for the convenience of the court; and the court cannot, for its own convenience in such cases, order a reference where there are difficult questions of law involved (2 *Abb. [N. S.]*, 294).

It is urged by the defendant in opposition to the application to refer this action, that its trial will involve the decision of

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difficult questions of law. If so, it should not be referred, though its trial should involve the examination of a long account.

Actions involving difficult questions of law must be tried by the court. It is true the plaintiff urges that the case involves no difficult questions of law. If he is correct in this, and that all the questions of law are of easy solution, it should, nevertheless, be tried by the court, unless the courts are overburdened with business and cannot try the case within a reasonable time, or without a delay which would seriously injure the rights of the parties, or one of them.

Nothing of that sort is shown by the papers upon the motion, nor is pretended. Indeed, I am informed that a reasonably speedy trial of the case may now be had at special term. There is nothing shown upon this motion to cause the court to depart from the theory of the law as provided in section 969, and the numerous cases holding that actions to set aside fraudulent conveyances, transfers, releases and settlements should be tried by the court (11 *How.*, 439; 2 *Abb.* [*N. S.*], 411).

The motion must be denied.



D I G E S T

CONTAINING THE WHOLE OF

3 HOWARD (NEW SERIES), ANTE, AND QUESTIONS OF PRACTICE CONTAINED IN 37, 38 AND 39 HUN, AND 100 NEW YORK REPORTS.

Attention is called to the four additional headings "CODE OF CIVIL PROCEDURE," "CODE OF CRIMINAL PROCEDURE," "CODE OF PROCEDURE," and "PENAL CODE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

ABDUCTION.

1. To support a conviction under the Penal Code for abduction (*sec.* 282 as amended by *sec.* 2, *chap.* 46, *Laws of* 1884), it must be proved, both that there was a "taking" within the meaning of the act, and that such taking was for the purposes of prostitution. (*People agt. Plath*, 100 N. Y., 590.)
2. The word "taking" implies some persuasive inducement on the part of the accused, not a mere permission or allowance to follow a life of prostitution. (*Id.*)
3. A conviction cannot be sustained upon the unsupported evidence of the female alleged to have been abducted, as to either element constituting the crime, *i. e.*, the taking or the intent. (*Penal Code sec.* 283.) (*Id.*)
4. Proof must be given, aside from her testimony, tending to establish the commission of the crime, and that it was perpetrated by the accused. (*Id.*)

ACCOUNTING.

1. The mere appearance of an interest is ordinarily sufficient to justify an order for an accounting by an administrator (1 *Bradf.*, 24).

The surrogate has no jurisdiction to determine the validity of a release, and where its invalidity is sworn to will direct an accounting. An accounting has been ordered at the instance of a residuary legatee who had given a release to the executor (25 N. Y., 143). (*Estate of Duffy, deceased, ante*, 240.)

See EXECUTOR AND ADMINISTRATOR. (*Moffat agt. Moffat, ante*, 156.)

ACTION.

1. Where plaintiff brought an action asking for the return of, and damages for the retention of, certain valuable papers, and the case was tried as one of replevin, and the jury rendered a verdict for plaintiff, awarding him the title, and thereafter plaintiff obtained an *ex parte* order for judgment, and that defendant deliver the papers, and that costs be taxed, and on the same day plaintiff entered judgment for costs and afterwards the judge struck the costs from the judgment on the ground that it was an action in replevin. On appeal from an order made on a motion of defendant to set aside the order and judgment:

Held, that the proceedings were irregular, either as an action of replevin or in equity, to compel specific performance; that the judg-

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- ment, and order for judgment, should be set aside, and the case stand as it was after the verdict was rendered; and if the court desire to hear it as an equitable action, it might do so. (*Hammond* agt. *Morgan*, ante 488.)
2. That an action upon contract is pending in the United States court, is no bar to another action in a state court to enforce the same cause of action. (*Oneida County Bank* agt. *Herrenden*, ante 446.)
 3. The rights of parties to a legal action are to be determined as they were at its commencement, unless some event, happening subsequently, and affecting those already in issue, is presented by supplementary pleadings to the court, and the fact that plaintiff, after the commencement of the action, was declared a bankrupt, and that the cause of action had passed to his assignee, cannot be proven on the trial where the answer was a general denial. (*Stiles* agt. *Fuller*, ante, 464.)
 4. Where an action was begun in the court of common pleas by plaintiff as ancillary administrator of a lunatic, against the committee of such lunatic for an accounting, and before trial entered an *ex parte* order of discontinuance on payment of costs, which was vacated by the court, and a motion to discontinue also denied, on the ground that the plaintiff intended to commence an action in the supreme court, and would harass defendant. *Held*, error, that ordinarily a suitor has a right to discontinue any action or proceeding commenced by him, and his reasons for so doing are of no concern to the court. (*Buller* agt. *Jarris, Jr.*, ante, 509.)
 5. Two actions against the same defendants upon the same cause of action—when the pendency of one such action in the United States court does not prevent the commencement of the other in the state court. (*Utica Clothes Dryer Mfg. Co.* agt. *Otis*, 37 *Hun*, 811.)
 6. Against the trustees of a mutual benefit association for a breach of duty—when the plaintiff must first request a receiver of the association to bring the action—to whom money collected under an assessment made by such an association belongs. (*See Fisher* agt. *Andrews*, 37 *Hun*, 176.)
 7. A creditor's action will not lie until the legal remedies are exhausted—when the dissolution of a corporation does not relieve a creditor from the necessity of recovering a judgment against it. (*See Andrews* agt. *Vanderbilt*, 37 *Hun*, 468.)
 8. When an action may be continued in the name of the original plaintiff after he has made a general assignment—Code of Civil Procedure, secs 449, 756. (*See Lawson* agt. *Town of Woodstock*, 37 *Hun*, 352.)
 9. Neglect of municipal officers to interfere to protect a taxpayers' rights—right of the latter to make the officers parties to an action brought by himself against the wrongdoers. (*Overton* agt. *Village of Olean*, 37 *Hun*, 47.)
 10. To recover the amount of an assessment paid to a city—effect of its voluntary payment before the commencement of proceedings to vacate the assessment. (*See Jones* agt. *Mayor*, 37 *Hun*, 513.)
 11. Right of, by a citizen to compel a public officer to do his duty. (*See People ex rel. Bolizer* agt. *Daley*, 37 *Hun*, 461.)
 12. Construction of amendatory statutes—when an amendment

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does not take away the right to recover penalties incurred under the original act prior to its amendment—1870, chap. 163—1890, chap. 567. (*See Nash* agt. *White's Bank of Buffalo*, 37 Hun, 57.)

13. Right of one tenant in common to maintain an action to remove a cloud on a title to land held by several tenants in common. (*See O'Donnell* agt. *McIntyre*, 37 Hun, 615.)

14. Pollution of a private stream by city sewage—the city is liable for the damages occasioned to riparian owners. (*See Hooker* agt. *City of Rochester*, 37 Hun, 181.)

15. On contract—damages—exemplary damages cannot be given in an action for breach of contract—the motives for its breach are immaterial. (*See Duche* agt. *Wilson*, 37 Hun, 519.)

16. One principal on a bond cannot sue a surety thereon, to recover for a breach of the bond by his co-principal. (*See Nans* agt. *Oakley*, 37 Hun, 495.)

17. Cause of action arising from fraudulent representations—when it passes to the general assignee of the party injured thereby. (*See Moore* agt. *McKinstry*, 37 Hun, 194.)

ADMINISTRATION.

1. Where an infant would be entitled, but for his infancy, to letters of administration with the will annexed, the guardian of such infant is entitled to letters unless disqualified for some cause specified in the statute. (*Estate of Blanck*, deceased, ante, 58.)

ADDITIONAL ALLOWANCE.

1. Where an assignee assaulted a security held by defendants to in-

demnify them against accommodation liabilities, assumed for the assignors and sought to strike it down as fraudulent and void, and failed in the principal purpose of his bill and was charged with costs payable "first out of the fund;" on motion for an extra allowance on the part of defendants, on the ground that the case was difficult and extraordinary:

Held, that the principles stated in *Burke* agt. *Candee* (68 Barb., 552) are applicable to this case and that an extra allowance should be made.

Held, further, that as the principal subject matter of the litigation was the chattel mortgage of \$28,000, and that having been sustained by the referee, upon that it is proper to make the allowance.

Held, also, that three per cent on the \$28,000 is a suitable sum to compensate the parties for the expenditures of skill, labor and professional ability required by the protracted trial. (*Couch* agt. *Milard et al.*, ante, 22.)

ADMISSIONS AND DECLARATIONS.

1. To prove certain telegrams claimed to have been sent by defendant, it was proved that the person receiving them subsequently mailed letters to the alleged sender, which stated the receipt of the telegrams and substantially their contents. *Held*, that the letters called for a denial if the messages were not in fact sent, and the omission of such a denial, or of an explanation of his silence by defendant when called as a witness, amounted to an admission that he did send them. (*Oregon S. S. Co.* agt. *Otis*, 100 N. Y., 446.)

AFFIDAVIT.

1. The affidavit to obtain an attachment, when made by plaintiff's at-

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torney, and which alleges that there is due these plaintiffs * * * over and above all counter-claims known to deponent, as deponent is informed and believes, is wholly insufficient. (*Acker agt. Jackson, ante, 160*)

2. An affidavit by one of several plaintiffs that the sum mentioned is due, over and above all counter-claims known to him, is sufficient. (*Id.*)

3. It does not affect the jurisdiction of the court in granting the second attachment, that the same affidavit was used in obtaining the first. (*Id.*)

See SUPPLEMENTARY PROCEEDINGS.
Webster agt. Stevens, ante, 320.

AFFIDAVIT OF MERITS.

1. On a motion to open a default an affidavit of merits is not always sufficient. (*Cooper & Company agt. Findlay, ante, 463.*)

2. An absolute refusal to open an inquest may be justified. (*Id.*)

3. The party moving to open the default must state the grounds of his motion clearly, and under certain circumstances must meet the opposing affidavit. (*Id.*)

AGENCY.

See CHECKS AND BILLS.
National Citizens' Bank agt. Howard, ante, 511.

ANIMALS.

See TRESPASS.
Atwater agt. Lowe, ante, 139.

APPEAL.

1. The method of referring to parts of the complaint as "at" or "between" certain folios, however convenient and easy in the first instance, serves no useful purpose upon appeal, nor does it conform to the spirit of the Code, which requires pleadings to be made out "in words at length and not abbreviated" (*Code of Civ. Pro., sec. 22*). (*Crosley agt. Cobb, ante, 37.*)

2. When, by inadvertence, an answer has been drawn, referring to the original folios of the complaint, the appeal book should be so printed as to render the pleadings intelligible. (*Id.*)

3. An order of special term appointing a referee to take the account of an executor, who has already accounted before the surrogate, for the information of the court, affects a substantial right, and is appealable to the general term. (*Moffat agt. Moffat, ante, 156*)

4. Where by the evidence it appeared that plaintiff might have been entitled to receive an undivided portion of the property to which he claimed the whole title, and to which the trial court gave him entire title, it was in the discretion of the general term to modify the verdict, or reverse it and send the case back for a new trial; and where the general term has exercised such discretion this court cannot review its action, and a motion for a reargument on such a ground will be denied. (*Van Horne agt. Campbell, ante, 202.*)

5. The only way in which to justify such a finding would be to look into the evidence, and as the trial court took the case from the jury, and made findings of fact in which no such title to part appears, it cannot be considered here. (*Id.*)

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6. The time in which an appeal from a decision of the general term, affirming a reduction of assessment made by the special term upon a *certiorari* brought under Laws of 1880, chapter 249, is regulated by section 7 of that law, and not by section 1825 of the Code of Civil Procedure, and such appeal *must* be taken within sixty days after service of a copy of judgment on appellant's attorney. (*People ex rel. Walkill Valley R. R. Co. agt. Kedor, ante*, 210.)
7. The surrogate having directed, in a case where one's right to be a party to a probate controversy was in dispute, that that issue should be inquired into and determined before the taking of any testimony in the matter of the factum of the will, a motion was made that a trial of all the issues proceed simultaneously. *Held*, that an order denying such motion was not appealable. *Held*, further, that a perfected appeal from an order denying a motion for taking by commission testimony without the state, though it concerned a "substantial right," within the meaning of section 2570 of the Code of Civil Procedure, did not operate as a stay of the trial of the probate controversy before the surrogate. (*Estate of Henry, ante*, 856.)
- See ATTORNEYS' LIEN.*
Adm't agt. Hall, ante, 373.
8. Judgment taken on an inquest must be reviewed by motion not by appeal. Where a judgment has been entered upon findings made and filed, after an inquest taken at a circuit, on the failure of the defendant to appear, the remedy of the defendant is by motion to set aside the judgment and not by appeal. (*Greenleaf agt. Brooklyn, etc., R. R. Co., 37 Hun*, 435.)
9. In this action of ejectment the plaintiffs put in evidence the record of a suit brought in chancery for the partition of certain lands, among which was included the lands in question in the present action. The complaint in the chancery suit alleged, and the referee appointed therein found, that one Emmons died seized of the premises described therein. The plaintiffs in the present action also introduced deeds, given in pursuance of the decree entered in the chancery suit, showing documentary title to the land in question: *Held*, that this proof was sufficient to sustain a finding that the plaintiffs were seized of the lands; that a judgment for partition in a suit in chancery imports of itself a seizin of the lands by the parties thereto. (*Id.*)
10. To enable the general term to review upon appeal a judgment, entered upon the verdict of a jury directed by the court, a case must be prepared and settled as required by section 997 of the Code of Civil Procedure. If this be not done the appeal brings nothing before the appellate court which it can review. (*Delano agt. Harp, 37 Hun*, 275.)
11. An appellant cannot object to an error which was advantageous to to him—power of the court to sentence for a part only of the term fixed by a statute—Penal Code, sec. 351—in case of an erroneous sentence the case will be remitted for further sentence. (*See People agt. Bour, 37 Hun*, 407.)
12. The notice of the entry of an interlocutory judgment in this action, served upon the guardian *ad litem* of certain infant defendants, who had appeared in person, was defective in that the post-office address of the attorney was not indorsed and subscribed upon it as required by rule 2 of the supreme court. The guardian *ad litem* ad-

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AGENCY.

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4. Where by the evidence it appeared that plaintiff might have been entitled to receive an undivided portion of the property to which he claimed the whole title, and to which the trial court gave him entire title, it was in the discretion of the general term to modify the verdict, or reverse it and send the case back for a new trial; and where the general term has exercised such discretion this court cannot review its action, and a motion for a reargument on such a ground will be denied. (*Van Horne* agt. *Campbell*, ante, 202.)

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mitted the due and proper service of a copy of the interlocutory judgment, and also of a summons to attend before the referee appointed thereunder, and also of the proper service of the final judgment. *Held*, that the defect in the notice was waived and could not be urged to sustain an appeal taken after the expiration of the time, as limited by its service, had expired. (*Puterson* agt. *McCouna*, 88 *Hun*, 581.)

13. Where a notice of appeal from a final judgment makes no reference to an interlocutory judgment theretofore entered in the action, neither the interlocutory judgment nor the case and exceptions can be reviewed on the appeal, nor has the court power in such a case to amend the notice of appeal by specifying therein the interlocutory judgment to be reviewed. (*Id.*)

14. Costs—on appeal from a judgment of a justice's court—Code of Civil Procedure, sec. 8070—to what cases it applies. (*See Vanderwerken* agt. *Brown*, 88 *Hun*, 234.)

15. A person suing as a poor person may appeal—the privilege of so suing does not extend to such appeal. (*See Moore* agt. *City of Troy*, 88 *Hun*, 301.)

16. In an action brought by the plaintiff to recover freight money, collected by the defendant Carhart, as its agent, and by him deposited with the defendant, the New York Produce Exchange Bank, an injunction was granted restraining the withdrawal of the moneys on deposit in the bank, during the pendency of the action. The referee before whom the action was tried, found that the moneys collected belonged to the plaintiff, but allowed items in the defendant's account, which were disputed by the plaintiff, amounting to about \$4,000, and awarded him

damages for a breach of a contract, alleged to have been made between the parties, to the amount of some \$6,000, thereby reducing the amount of the plaintiff's recovery to some \$7,000 or \$8,000, which was directed to be paid out of the funds on deposit in the bank.

The plaintiff who desired to appeal from that portion of the referee's report, which allowed the said items and the counter-claim of the defendant, moved, upon the ground of Carhart's irresponsibility, for an order appointing a receiver of the fund or for its payment into court, or for a continuance of the injunction during the pendency of the appeal:

Held, that the court properly refused to grant the relief sought, but that it should have granted an order directing that on the appeal the recovery of the counter-claim and of the \$4,000 of disputed items, should be treated as a judgment in Carhart's favor, the collection or enforcement of which might be stayed during the pendency of the appeal on the execution of an appropriate bond as upon a judgment against the plaintiff for the amount, with interest and damages, and costs if the judgment be affirmed. (*New York, L. E. and W. R. R. Co.* agt. *Carhart*, 39 *Hun*, 516.)

17. Upon the hearing of an appeal from a judgment of the court of sessions of Queens county, affirming a judgment of a court of special sessions, convicting the defendant of disturbing certain oyster beds, it was for the first time objected, that in the charge before the court of special sessions, the prefix "un" had been omitted, making the charge allege that the defendant "lawfully" did the acts set forth:

Held, that as the error was not specified in the affidavit, required by section 751 of the Code of Crimi-

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- nal Procedure, it could not be considered. (*People ex rel. Baker agt. Beatty*, 39 Hun, 476.)
18. *It seems*, that if the objection had been properly brought before the court, it would have been sustained. (*Id.*)
19. In this action, brought by a wife for a limited divorce, a judgment dismissing the complaint was entered upon the confirmation of the report of a referee. The plaintiff having appealed from the judgment, moved for an order requiring the defendant to furnish means to enable her to print the papers on appeal:
Held, that the court properly denied the motion because of a want of power to make the order after the entry of the judgment, but that as it appeared to the general term that the appeal was by no means a frivolous one, it would modify the order of the court below so as to allow the plaintiff to bring the case to a hearing upon written papers and without printing the same. (*Fagan agt Fagan* 39 Hun, 531.)
20. Where a party appealing from a judgment, entered upon the report of a referee, desires to raise in the appellate court the question that any finding of fact is against the weight of evidence, he must have the case so prepared as that it shall appear therefrom that all the evidence, bearing on the finding of fact sought to be reviewed, is set forth therein. (*Spence agt. Chambers*, 39 Hun, 193.)
21. Where, however, he claims that a particular finding of fact is without any evidence to support it, and he has excepted thereto as provided in section 993 of the Code of Civil Procedure, thereby presenting for review only a question of law, it is unnecessary to state in the case that
- all the evidence bearing on such finding is set forth therein. (*Id.*)
22. The case as settled by the referee before whom this action was tried, stated that a motion to dismiss the complaint was made on the ground that no case had been proven against the defendant, but it did not state how he disposed of the motion, or that any exception was taken by either party. The referee subsequently found that the plaintiff had no title to the note upon which the action was brought, and directed the complaint to be dismissed:
Held, that the case did not present for review any question as to the ruling of the referee on the motion for a nonsuit. (*Pritchard agt. Hirb*, 39 Hun, 378.)
23. Undertaking on appeal—when void as a statutory obligation it may be sustained as a common-law agreement. (*See Ryan agt. Webb*, 39 Hun, 485.)
24. Taking of a street by a railroad—a party by accepting the award for the taking, waives his right to appeal from the order appointing the commissioners. (*See Matter of N. Y. and H. R. R. Co.*, 39 Hun, 338.)
25. Action of ejectment—power of the court to set aside a second judgment—Code of Civil Procedure, sec. 1525—the discretion exercised by the court below is reviewable on appeal. (*See Keeler agt. Dennis*, 39 Hun, 18.)
26. Decree of surrogate—when appealable. (*See Matter of Gilbert*, 39 Hun 61.)
27. Where a copy of a judgment was indorsed with the names of the plaintiff's attorneys and their office address, and below this was also indorsed a notice of judgment signed by said attorneys without

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- giving their office address, *held*, that there was a sufficient compliance with the rule, and the notice was effectual to limit the time for appeal. (*Falkner agt. N. Y., W. S. and B. R. Co., 100 N. Y., 86.*)
28. The attorneys of record for defendant were W., McL. & D. The notice was served at their office, received by their managing clerk, entered in their register, and was retained. It was addressed to W. & McL., a firm occupying the same office. W. was a member of both firms and the former existed only with reference to unfinished business. On previous occasions admissions of service of paper in this action served at the same office and addressed to W., McL. & D. had been signed with the firm name of W. & McL. *Held*, that the omission to insert in the address the names of all the partners did not, under the circumstances, invalidate the notice. (*Id.*)
29. While strict practice must be pursued to limit the time to appeal, a mere inaccuracy in the notice of judgment which violates no rule of practice and is itself immaterial will not be sufficient to avoid it. (*Id.*)
30. Where numerous exceptions appear in a case, most of which are untenable, but some one of them may be sustained by reason or authority, the attention of the court should be specifically called thereto; it is not sufficient to group them all together in the points of counsel under a single allegation of error, without stating a ground to support any one. (*Nelson agt. Vil. Canisteo, 100 N. Y., 89.*)
31. An appeal from a judgment entered on a verdict must be determined solely upon exceptions taken on the trial. (*Third Ave. R. I. Co. agt. Ebling, 100 N. Y., 98*)
32. An exception can be taken only to a ruling by the trial court upon a question of law. (*Id.*)
33. Where there is no exception to a ruling of the court as to the sufficiency of the evidence to establish a fact in issue and the defeated party desires to move for a new trial, he must do so in the first instance before the trial court or at special term (*Code of Civ. Pro., secs. 999, 1002*). (*Id.*)
34. Not having done this, no question affecting the merits or the sufficiency of the evidence to support the verdict may be raised at general term. (*Id.*)
35. An exception to the admission of evidence may only be taken when it is received against the parties' objection. (*Id.*)
36. It is not essential to the validity of an order of the general term allowing an appeal to this court, in the cases wherein an appeal is not permitted except when so ordered, that the general term making the order shall be composed of the same judges who constituted the general term which decided the case. The only restriction upon the power of the general term to make the order is that it shall be "made at the general term which rendered the determination or at the next general term after judgment is entered thereupon" (*Code of Civ. Pro., sec. 191, subd. 2 and 3*). (*Id.*)
37. Where an order of general term, reversing a judgment entered on the report of a referee, omits to state that the reversal was upon the facts as well as the law, so far as the facts are concerned it is for this court, on appeal from the order, simply to determine if there was any evidence sufficient in law to sustain the judgment. (*Kane agt. Cortesy, 100 N. Y., 182.*)

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38. The provisions of the Code of Civil Procedure regulating the method by which a review of errors on a trial before a surrogate may be secured, and providing for a loss of a right of review unless such methods are regularly pursued, furnish and limit the only remedy against such errors. If a court of record has inherent power over its own records, to modify, annul and vacate them independent of any special statutory authority (as to which *quære*), it belongs exclusively to the court whose records are in question and may not be exercised for it by an appellate tribunal. (*In re Hawley*, 100 N. Y., 206.)
39. Within the meaning of the provision of the Code of Civil Procedure (*sec.* 1296), which declares that "a person aggrieved, who is not a party" to an action or proceeding, but who is entitled to be substituted in place of a party, may appeal from a judgment or order; a person is not "aggrieved" unless the judgment or order has binding force against his rights, his person or his property; the fact that it may remotely or contingently affect interests which he represents does not give him a right to appeal. (*Ross* *agt. Wigg*, 100 N. Y., 243.)
40. A receiver appointed in supplementary proceedings is not entitled to be substituted as defendant in place of the judgment debtor in an action brought by other creditors against him. (*Id.*)
41. *It seems*, that said provision contemplates mainly, if not exclusively, cases where the party to the record is merely a nominal one, and the real party in interest is the one aggrieved, or where, since the judgment or order, there has been in some way a devolution of the entire interest upon some person not a party. (*Id.*)
42. In an action upon a promissory note damages for the conversion by the holder of property pledged to him as security for the payment of the note may properly be pleaded as a counter-claim; and the amount thereof must be taken into consideration in determining whether a judgment in such action is reviewable in this court. (*Cass* *agt. Higginbotham*, 100 N. Y., 248.)
43. After the commencement of such an action defendant tendered the amount due on the note with costs on condition that plaintiff return the property pledged, which return was demanded and refused. *Held*, that it was not essential to the validity of the tender to pay the money into court; that defendant was entitled to make the tender conditional, and the refusal of plaintiff to surrender the property pledged rendered him liable for a conversion; also, that defendant was entitled to counter-claim damages for the conversion, although occurring after the commencement of the action; and that, if an application to the court for leave to set up the tender as a defense was necessary, as the answer was received and retained without objection, and plaintiff had allowed the trial to proceed without objection, and had obtained judgment, it was too late to insist on appeal that the defense was improperly pleaded because no leave was obtained. (*Id.*)
44. Errors upon a criminal trial can be made available in this court only by exception duly taken on the trial. This rule is not changed by the provision of the Code of Criminal Procedure (*sec.* 537), authorizing the supreme court on appeal in a criminal action to grant a new trial where the judgment is against evidence or law, although no exceptions were taken on the trial. (*People* *agt. Guidici*, 100 N. Y., 508.)
45. Where upon a criminal trial the

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deposition of a witness taken in pursuance of said Code (*secs. 620-638*) on the application of the prisoner was offered in evidence on behalf of the people, and received without objection or exception on the part of the defendant, *held*, that no question as to its admissibility could be considered here. (*Id.*)

46. A general exception to a portion of a charge is of no avail, unless all of the propositions laid down therein are erroneous. (*Id.*)

47. A provision in a judgment in an action by a husband against his wife for a separation, awarding the custody of minor children to the husband, is in the discretion of the trial court, and is not reviewable here. (*Waring agt. Waring*, 100 N. Y., 570.)

48. Resort may be had to evidence given on a trial showing facts not found, for the purpose of sustaining the decision of a referee, but not to reverse it where there was no request and refusal to find. (*Kerrison agt. City of Syracuse*, 100 N. Y., 577.)

49. Where an answer is uncertain, by reason of general averments, it is for the court below to determine whether further information required by plaintiff shall be given by a more specific answer or by a bill of particulars, and its determination is not reviewable here. (*Kelsey agt. Sargent*, 100 N. Y., 602.)

50. Whether a court shall modify or change an order already made by it is a question addressed to its discretion, and over its exercise an appellate court has no control. (*Place agt. Hayward*, 100 N. Y., 626.)

APPEARANCE.

1. When a voluntary appearance of one having a lien on a vessel does

not give jurisdiction over the vessel in proceedings under chapter 428 of 1862. (*See Nelson agt. Yates*, 37 Hun, 52.)

ARREST.

1. Where a complaint alleged a delivery to defendant, a commission merchant, of goods to be sold for cash, for plaintiff, to whom the proceeds, after deducting commissions, were to be paid; that defendant sold the goods but refused to pay over the amount due, and converted it to his own use:

Held, that the action was upon contract and the allegation of conversion of the proceeds was mere surplusage; and a ground of arrest based upon a claim that defendant acted in a fiduciary capacity is extrinsic to the cause of action, so that a motion on affidavits at special term to vacate the order of arrest should have been decided on the merits, and it was error for the court to refuse to pass upon the question, deeming it a proper one for the jury on the trial of the action. (*Donovan agt. Cornell*, *ante*, 98.)

2. Where an order of arrest is obtained in an action where the cause of action and cause of arrest are identical, and the order of arrest is vacated on motion, and the plaintiff on the trial withdraws by stipulation the allegations of fraud from the complaint.

Held, that the order vacating the order of arrest became the final decision that the plaintiff in said action was not entitled to the order of arrest, and an action was maintainable upon the undertaking for damages sustained by reason of the arrest. (*Rothnell agt. Faine et al.*, *ante*, 187.)

3. In general there cannot be even a second arrest for the same cause of action, unless it is shown not to

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be vexatious. (*Citizens' National Bank of Hornellsville* agt. *Vorhis*, ante, 410.)

4. The question whether or not it is vexatious is to be determined by the circumstances of each case. (*Id.*)
5. There seems to be no reason why even a third arrest should not be permitted, if it clearly appears not to be resorted to for the purpose of vexing the defendant. (*Id.*)
6. Circumstances under which a third order of arrest for the same cause of action was sustained. (*Id.*)
7. Where a factor mingles the proceeds of sales indiscriminately with his own funds, and by usage pays by his check on Saturday for all merchandise delivered during the week, whether the same were then sold or unsold, the relation of the parties is not a fiduciary one within the meaning of subdivision 3 of section 550 of the Code, but an ordinary one of debtor and creditor, and an order of arrest issued in such a case cannot be upheld. (*Donovan* agt. *Cornell*, ante, 525.)

ASSIGNMENT.

1. The fact that in an assignment no provision is made for the preference for the wages or salaries owing to employees may invalidate the assignment, yet merely because an assignment is void upon its face affords no reason for the issuance of an attachment. (*Blackington* agt. *Goldsmith*, ante, 77.)
2. The fact that the assignee does not actually reside in the state does not of itself furnish proof of fraudulent intent. (*Id.*)
3. A *chose in action* may be assigned by parol, but to constitute such an assignment, there must be a surrender of all control over the demand

by the creditor, and the appropriation of it by the purchaser must be absolute and unqualified. (*Throop Grain Cleaner Company* agt. *Smith*, ante, 290.)

4. Where on a proposed sale of a demand no part of the purchase price is paid by the purchaser, an agreement that the price shall be applied to a precedent debt owing by the seller to the buyer, does not amount to a payment of the purchase money as required by the statute of frauds, unless actually applied by giving a receipt or otherwise. (*Id.*)
5. How much must be done to make an effectual assignment of an account, *quarry*. (*Id.*)
6. Where a general assignment was made by W. & B., commission merchants, to one W., and it appeared by the petition of The U. M. Co. of Md., that the petitioner had for several years been shipping its goods to the assignors to be sold strictly on commission, the assignors having no interest in the goods sold nor in the proceeds thereof, except such commission as was agreed upon; and at the time of the assignment by W. & B. they held moneys collected for The U. M. Co. of Md., which they turned over to the assignee, W., and that there were other moneys due from persons to whom sales had been made by W. & B. before their assignment; the consignors of the goods applied *ex parte* (i. e., notifying the assignee only and not the creditors), to the court by petition, on the facts stated, for an order directing the assignee of W. & B. to pay over the collected moneys, and, also, that the uncollected moneys be paid directly to the consignor of the goods:

Held, that on the facts stated an *ex parte* order should not be granted for the payment of the moneys to the consignors.

Held, further, that the general

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creditors are entitled to a hearing and to inquire into the facts respecting the assignment, its items and the agreement as to the disposition of the proceeds; that an order of reference to inquire into the facts and provide that all creditors whose names appear on the assignee's books be at liberty to appear and contest the right of the consignors to follow the proceeds of the goods sold by the assignors. (*In re Assignment of Watson*, ante, 818.)

7. Where the facts on the report of the referee satisfy the court of the correctness of the allegations in the petition, and it appears that the sales made by the consignees were strictly on commission, the proceeds, less commissions, belonging to the consignor under the agreement between the commission merchants and the manufacturers, will be directed to be turned over to the petitioner by the assignee and purchasers of the goods in question. [See note at end of case.] (*Id.*)

ASSIGNMENT OF COUNSEL

1. Where the court assigns counsel to defend a prisoner, the counsel's claim for his services is not a legal charge against the county. (*The People ex rel. Brown* agt. *Board of Supervisors*, ante, 1.)
2. The defense of poor prisoners, upon assignment by the court, is one of the duties contemplated by the lawyer's oath of office, which he impliedly assumes in accepting the privilege of practicing law. (*Id.*)
3. A claim for services rendered by an assigned counsel, is not a charge against the county, because there is no statute directing or authorizing the court to assign counsel to defend prisoners, or providing any mode of payment for such service. (*Id.*)

4. Section 809 of the Code of Criminal Procedure has not changed the law in this respect. (*Id.*)

ATTACHMENT.

1. The fact that in an assignment no provision is made for the preference for the wages or salaries owing to employees may invalidate the assignment, yet merely because an assignment is void upon its face affords no reason for the issuance of an attachment. (*Blackington* agt. *Goldsmith*, ante, 77.)
2. The fact that the assignee does not actually reside in the state does not of itself furnish proof of fraudulent intent. (*Id.*)
3. The affidavit to obtain an attachment, when made by plaintiff's attorney, and which alleges that there is due these plaintiffs * * * over and above all counter-claims known to deponent, as deponent is informed and believes, is wholly insufficient. (*Acker* agt. *Jackson*, ante, 180.)
4. An affidavit by one of several plaintiffs that the sum mentioned is due, over and above all counter-claims known to him, is sufficient. (*Id.*)
5. It does not affect the jurisdiction of the court in granting the second attachment, that the same affidavit was used in obtaining the first. (*Id.*)
6. Although a summons in an action has not been served in a due and orderly manner, yet, if defendant was sufficiently advised of the proceeding to protect his rights, that does not warrant the vacating of a preceding attachment of which the defendant does not assert he was ignorant. (*Fulton County Chemical Works* agt. *Jochen*, ante, 168.)

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7. In an action to recover the purchase price of goods sold and delivered, an attachment may issue and will be sustained, notwithstanding that it is alleged in the complaint, and also stated in the affidavits, that fraudulent representations were made concerning the financial condition of the business by which the plaintiffs were induced to sell and deliver the goods. (*Whitney et al. agt. Hirsch et al.*, ante, 172.)
8. The case of *Wittnen agt. Von Minden*, 27 Hun, 234, commented on and explained. (*Id.*)
9. Copies of affidavits made and filed in another action against the same defendants, brought by another plaintiff, may be used to sustain an attachment, where an inability to obtain affidavits in the action from persons whose affidavits were made in the other suit is shown. (*Id.*)
10. On a motion to vacate an attachment in three cases, the main question both as to the existence of the alleged cause of action and of the fraud which is the ground of the attachment was as to the partnership of the defendants; that being alleged on information and belief based mainly on the written deposition of one of the defendants in proceedings supplemental to execution in another case. In one of the cases the affiant states that he has the deposition in his possession, but does not attach a copy or show any reason for not doing so. In the other cases a copy is attached showing the defendants to be partners: *Held*, that the copy deposition could be considered, and without it the affidavit would be defective and not a sufficient basis for allowing the attachment.
Held, further, that in the first case the attachment cannot stand, but in the other two cases the attachment should stand. (*Moore agt. Richardson*, ante, 238.)
11. Where an action is brought by an attaching creditor jointly with the sheriff who levied the attachment, against a creditor of the defendant in the attachment, to recover a claim attached, in aid of the attachment, pursuant to sections 677, 678 and 679 of the Code of Civil Procedure, and which is defended upon the ground that the demand was assigned prior to the levy of the attachment, it seems inquiry cannot be made into the question whether or not the transfer was fraudulent as against the attaching creditor. (*The Throop Grain Cleaner Company agt. Smith*, ante, 290.)
12. No lien is created by the levy of an attachment upon a claim, unless the legal title to the demand is in the attachment debtor at the time of the levy. (*Id.*)
13. Where there has been no formal transfer of the title to a demand levied upon under an attachment, it becomes a mixed question of fact and of law whether or not a transfer has been effected. (*Id.*)
14. In such a case, whether or not a present appropriation of a debt or demand has been effected, so as to constitute a legal or an equitable assignment, is a question of intention, to be submitted to the jury, as matter of fact, for their determination, upon the language used by the parties, written or verbal, and the surrounding facts and circumstances. (*Id.*)
15. The sureties upon an undertaking, given upon the issuing of an attachment, are liable for the costs of the action, awarded to the defendant upon the dismissal of the complaint, even though the attachment itself be never formally vacated. Section 640 of the Code of Civil Procedure provides that

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"the judge before granting the warrant must require a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking;" the words "which he may sustain by reason of the attachment," apply only to the word "damages," and not to the words "costs which may be awarded to the defendant." (*Lee* agt. *Homer*, 87 *Hun*, 684.)

16. In this action, brought against the defendants Hirsch and Stern, who were alleged to have been carrying on business as partners, to recover the value of goods and merchandise sold to them, an attachment was issued upon the ground that the defendant Hirsch had disposed of his property with intent to defraud his creditors, by making a general assignment in which he preferred his co-defendant Stern. It was alleged in the complaint, and in the affidavits upon which the attachment was granted, that the plaintiffs were induced to sell and deliver the goods by fraudulent representations concerning the defendants' financial condition. *Held*, that the action was one in which an attachment might properly be issued, it being an action to recover damages for a breach of an express contract other than a contract to marry, within the intent of subdivision 1 of section 635 of the Code of Civil Procedure, and that the insertion of the allegations of the fraudulent representations did not convert it into an action in tort. That if it were considered to be in tort and not on contract the attachment might still be issued, as it would be an action to recover damages for

"fraud" or for "an injury to personal property," within the meaning of subdivision 8 of section 635 of the Code of Civil Procedure. (*Whitney* agt. *Hirsch*, 39 *Hun*, 835.)

17. Some of the affidavits used upon the hearing were not made in this action, but in part consisted of copies of affidavits and extracts from others, made and filed in an action against the same defendants, brought by Horace B. Clafin and others. These copies and extracts were included because of an alleged inability to obtain affidavits in this action from the persons whose affidavits were used in the Clafin action. *Held*, no error. (*Id.*)
18. An affidavit made by the agent or attorney of a plaintiff will support an attachment, if it proves the necessary facts. (*James* agt. *Richardson*, 39 *Hun*, 899.)
19. Statements in the affidavits will be presumed to have been made on personal knowledge, unless stated to be on information, or unless it appears affirmatively or by fair inference that they could not have been or were not made on such knowledge. (*Id.*)
20. Upon an application for an attachment in an action to recover the price of goods sold to the defendants who were claimed to be liable as partners, a copy of the deposition of one of the defendants, made in proceedings supplementary to execution instituted in another action, was annexed to the affidavit made by the plaintiffs' attorney, in which the failure to use an original affidavit was excused by a statement that the defendant making the said deposition had refused to make an affidavit in other cases. *Held*, that the copy of the deposition was properly received and considered by the court. (*Id.*)
21. The facts stated in the moving

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papers considered, and held to sufficiently establish that the plaintiffs were entitled to recover the sum claimed, over and above all counter-claims known to them. (*Id.*)

22. A levy under a warrant of attachment upon property capable of manual delivery is made by the taking of the property into the actual custody of the sheriff. (*Adams* agt. *Speelman*, 89 *Hun*, 85.)

23. The last sentence of subdivision 2 of section 649 of the Code of Civil Procedure, providing that "he must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant and of the affidavit upon which it was granted," is directory only, and a failure to comply therewith is an irregularity which does not destroy the effect of the levy if otherwise valid. (*Id.*)

24. The failure of the plaintiff to serve the summons upon the defendant personally, or to commence its service by publication within thirty days from the time at which an attachment against the defendant's property has been issued, is not a mere irregularity, but a jurisdictional omission, which destroys the warrant, nor will its validity be restored, or in any way affected, by the fact that the defendant, after the expiration of that time, appeared and defended the action. (*Cossit* agt. *Winchell*, 89 *Hun*, 439.)

25. When it cannot be attacked in a collateral proceeding—mortgage of property to secure payment of a part of the mortgagor's debts and in trust to pay other debts—void, when a general assignment containing the same provisions would be. (*See Brown* agt. *Guthrie*, 89 *Hun*, 29.)

ATTORNEY.

1. Under the provisions of the Revised Statutes (2 *R. S.*, 288, sec. 71), and it seems under the provisions of the Code of Civil Procedure (sec. 78), prohibiting an attorney from buying directly or indirectly, or being interested in the purchase of a thing in action, "with the intent and for the purpose of bringing an action thereon," when the purpose of such purchase is to bring an action, and is induced by the procurement of an attorney, it comes within the act, whether the transfer be taken in his name or that of another person, and no cause of action can arise out of a transfer thus prohibited. (*Browning* agt. *Marvin*, 100 *N. Y.*, 144.)

ATTORNEY'S LIEN.

1. Where an infant would be entitled, but for his infancy, to letters of administration with the will annexed, the guardian of such infant is entitled to letters unless disqualified for some cause specified in the statute. (*Estate of Blanck, deceased*, ante, 58.)

2. Section 66 of the Code of Civil Procedure now gives an attorney a lien upon his client's cause of action, both before and after judgment in favor of the client, and at all intermediate stages of the cause of action. The lien is given upon the cause of action, and such lien attaches to any verdict, report, decision or judgment in his client's favor. The lien being upon the cause of action, must continue until a judgment is rendered in the action which is final, either for want of power to appeal or for failure to appeal in time, by which judgment it shall have been determined there was no cause of action, and so nothing to support a lien. *Adut* agt. *Hall*, ante, 373.

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3. A client has not an absolute right to stop the litigation after a judgment upon the merits has passed against the cause of action; but the right of a plaintiff to stop the litigation after an adverse judgment upon the merits, is subject to the attorney's lien for his costs and the attorney's approval. (*Id.*)
4. The attorney has the right, at his own expense, to bring and prosecute an appeal from a judgment against his client, and against the wishes of such client, in order that the attorney may, if successful upon the appeal, obtain a new trial and a favorable judgment, and a chance of collecting his costs from the opposite side by means of such judgment. (*Id.*)

ATTORNEY'S SERVICES.

See REFERENCE.

Hale et al. agt. Swinburne, ante, 472.

BAILMENT.

See BOND.

Ridley et al. agt. Brady, ante, 94.

BANKRUPTCY.

1. The rights of parties to a legal action are to be determined as they were at its commencement, unless some event, happening subsequently, and affecting those already in issue, is presented by supplementary pleadings to the court, and the fact that plaintiff, after the commencement of the action, was declared a bankrupt, and that the cause of action had passed to his assignee, cannot be proven on the trial where the answer was a general denial. (*Styles agt. Fuller, ante, 464.*)

BILL OF PARTICULARS.

1. In this action brought on an ac-

count stated, the plaintiff, pursuant to a demand of the defendant, served a general bill of particulars without items giving the aggregate of their accounts at \$2,985.77, and the aggregate of the defendant's account at \$2,127.13, leaving \$858.64 as the balance claimed on an account stated. The defendant moved for a further bill of items averring that the accounts of the parties ran back for a period of about twenty-five years; that there had been no complete and full settlement or adjusting of them, nor any balance struck or agreed upon, and that their true and full amount was unknown to him; that he supposed that items had been omitted therefrom, and that if he found on full examination that an indebtedness existed against him, he desired to offer judgment for the amount thereof. The court ordered the plaintiffs to give the items of the account, unless they would stipulate to stand by their complaint on an account stated: *Held*, that the defendant was, under the circumstances of the case, entitled to have a bill of items. That the motion should have been granted without allowing the plaintiffs to withhold the bill of particulars by giving the stipulation referred to, but that as the defendant did not appeal, this court would affirm the order as made (*Wells agt. Van Aken, 89 Hun, 815.*)

2. A defendant may be required to serve a bill of particulars as to matter set forth in his answer, which is effectual only as a defense, as well as to matter set up as a counter-claim. (*Kelsey agt. Sargent, 100 N. Y., 802.*)
3. Where the matter is left uncertain by reason of general averments, it is for the court below to determine whether further information required by plaintiff shall be given by a more specific answer or by a

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bill of particulars, and its determination is not reviewable here. (*Id.*)

BONA FIDE HOLDER.

See CHECKS AND BILLS.
National Citizens' Bank agt.
Howard, ante, 511.

BOND.

1. There is a well-defined distinction between the liability of a surety upon a bond for the faithful performance of a public official's duties, and that of a surety upon a bond for the faithful performance of the duties of one not occupying such a position—one who is to perform duties in the ordinary sphere of an employee in the transaction of business between private individuals in a business community. (*Ridley et al. agt. Brady, ante, 94.*)
2. Sureties upon an official bond are bailees, but they are special bailees, subject to special obligations, and the ordinary laws of bailment cannot be invoked to determine the degree of their responsibility. (*Id.*)
3. The ordinary laws of bailment can be invoked to determine the degree of the responsibility of sureties upon a bond for the faithful performance of the duties of others, not public officials. (*Id.*)
4. In an action upon an employee's bond which, in terms, guarantees that he shall, at all times, "account" for all merchandise intrusted to him, and, if he "fails to account for any such goods" the surety will pay for their value:
Held, that such employee was a bailee for hire, and the law required of him ordinary diligence, and made him responsible for ordinary neglect; he was, in no sense, an insurer of the articles or moneys

in his custody, and should not be held responsible for the same, if stolen from him, without any negligence or fault or want of care on his part:

Held, further, that a surety on the bond of such employee has a right to interpose a defense, under a denial of the allegations of the complaint, that such employee has accounted for the goods, admitted to have been stolen, within a legal construction of the terms of such bond. (*Id.*)

CATHOLIC PROTECTORY.

1. Under section 291 of the Penal Code, the commitment of a child found begging in the streets, does not make such commitment absolute, final or unconditional, but such commitment is to be governed by the charter and rules of the institution to whose care he is consigned. (*People ex rel. Van Heck agt. New York Catholic Protectory, ante, 343.*)
2. Heretofore, under the consolidation act the magistrate could commit the destitute child to but one of the three specified institutions, and the only effect of the first alternative of section 291 is to permit the magistrate to commit such child to any charitable or reformatory institution authorized by law to take charge of minors; but in every case the institution so authorized was left to take and hold the child for the time, and in the manner and under the regulations prescribed by its fundamental law. (*Id.*)

CERTIORARI.

1. The provision of the Code of Civil Procedure (*sec. 2141*), authorizing the court, upon a hearing on return to a writ of *certiorari*, to "make a final order annulling or confirming wholly or partly, or modifying the determination reviewed," does not

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authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion. (*People ex rel. agt. B'd Fire Com'rs*, 100 N. Y., 82.)

2. Said provision is to be read in connection with the preceding one (sec. 2140), which defines the questions which may be determined by the court upon *certiorari*, and simply gives power to correct an erroneous adjudication, instead of reversing it absolutely. (*Id.*)

2. Where, therefore, the general term, on *certiorari* to review an order of the board of fire commissioners of the city of New York dismissing the relator from service as fireman, modified the order by directing his suspension for six months, and there was no question of jurisdiction, procedure or evidence, giving to the general term jurisdiction to interfere with the order, *held error*. (*Id.*)

CHECKS AND BILLS.

1. A check or inland bill of exchange, drawn in the ordinary form, not describing any particular fund or using any words of transfer of the whole or any part of a demand standing to the credit of the drawer, does not operate as an assignment, either legal or equitable, of such demand, to have the effect of an equitable assignment, the draft must be drawn on a particular specified fund or demand. (*Throop Grain Cleaner Company agt. Smith*, ante, 290.)
2. Where the drawer of a draft for a demand due from the drawee delivers the draft to the payee, accompanied with propositions of sale, which are accepted by the payee, and their minds meet on the terms of the bargain, and the draft is delivered and received as a mode of effecting a transfer of the title of the claim against the drawee, the title would pass, although the drawee refused to accept the draft. But the delivery of the draft alone, without any arrangement relative to a bargain and sale of the demand, or the delivery of the draft, accompanied with propositions of sale, not accepted by the payee, would transfer neither the legal or equitable title to the demand. (*Id.*)
3. A draft made and delivered to the payee for the purpose of transferring the title of a claim due from the drawee, and the payee parts with no value, and relinquishes no rights against the drawer, the draft will not pass the title or affect an equitable assignment of the demand. (*Id.*)
4. Upon a deposit being made by a depositor in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or drafts or checks is immediately vested in and becomes the property of the bank. (*Nat'l Citizens' Bank agt. Howard*, ante, 511.)
5. It is a fraud upon a depositor for a bank or banker to permit a depositor, in reliance upon the supposed solvency of the bank, to make deposits after it has become irretrievably insolvent, and such insolvency was known to the bank or its agent, and upon the discovery of the fraud the depositor may rescind the contract and reclaim the check or draft deposited, unless such check or draft has come into the possession of a *bona fide* holder for value. (*Id.*)
6. A person claiming to be a *bona fide* holder of a negotiable instrument must show under what circumstances the instrument came into his possession, and to establish his title to the instrument he must

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show the consideration he paid for it. (*Id.*)

7. Where the defendant, late on the seventh of November, deposited the check in suit with M. & Co., bankers at Mt. Vernon, and after business hours said check was deposited by M. & Co. in the post-office, to be sent to plaintiff for payment of check of M. & Co., paid that day by plaintiff, on M. & Co.'s promise to make a deposit before the bank opened on the following morning:

Held, that plaintiff had no right to the check or its proceeds as against the defendant. (*Id.*)

8. The mere fact that M. & Co. had promised to make good or pay any indebtedness of his to plaintiff, and that the plaintiff relied on such promise, would not be sufficient to constitute the plaintiff a *bona fide* holder for value. (*Id.*)
9. The post-office was used as a messenger of M. & Co. to make the deposit, and not as the agent of the bank in receiving it. (*Id.*)

CHILDREN BEGGING.

1. Under section 291 of the Penal Code, the commitment of a child found begging in the streets, does not make such commitment absolute, final or unconditional, but such commitment is to be governed by the charter and rules of the institution to whose care he is assigned. (*People ex rel. Van Heck agt. New York Catholic Protectory, ante, 843.*)
2. Heretofore, under the consolidation act, the magistrate could commit the destitute child to but one of the three specified institutions, and the only effect of the first alternative of section 291 is to permit the magistrate to commit such child to any charitable or reformatory institution authorized by law to take charge of minors; but in every

case the institution so authorized was left to take and hold the child for the time, and in the manner and under the regulations prescribed by its fundamental law. (*Id.*)

CIVIL SERVICE LAWS.

1. Officers and employees of the aqueduct commission, created and appointed under and by the provisions of chapter 490 of the Laws of 1888, are local officers; the functions they are to perform are for the peculiar corporate and pecuniary benefit of the corporation of the city; the corporation of the city of New York is liable for their acts; they are agents of the city, and the act expressly recognizes the city's liability upon their contracts. (*The People ex rel. Ryan agt. The Civil Service Supervisors, ante, 41.*)
2. The appointees and employees of the aqueduct commissioners should be examined by the civil service boards of the city of New York as local city officers, and not by the state civil service commissioners as state officers. (*Id.*)

CODE OF CIVIL PROCEDURE.

1. Title 8, chapter 17—Proceedings to punish for contempt—distinction between civil and criminal contempts—limits of the indemnity to be allowed to a party injured by a contempt punishable civilly—Code of Civil Procedure, sections 8 to 14. (*See King agt. Flynn, 87 Hun, 329.*)
2. Sections 8, 9—A willful violation of an injunction is a criminal contempt—power of the court to punish it. (*See Stubbs agt. Ripley, 89 Hun, 626.*)
8. Sections 8 to 14—Limits of the indemnity to be allowed to a party

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injured by a contempt punishable civilly. (*Id.*)

4. Sections 8-14, 2284, 2285—Where, during a criminal trial, a jurymen went during a recess to the scene of the affray, without the permission of the court, for the purpose of acquainting himself with the locality and its surroundings, he is not guilty of a criminal contempt, for which he would be summarily punished by the court.

A civil contempt may go beyond the statutory enumeration, and draw in what was usual or permissible at common law, but criminal contempt is precisely defined and barred in by the statute. (*People ex rel. Munsell* agt. *Oyer and Terminer*, *ante*, 418.)

5. Section 22—The method of referring to parts of the complaint as "at" or "between" certain folios, however convenient and easy in the first instance, serves no useful purpose upon appeal, nor does it conform to the spirit of the Code, which requires pleadings to be made out "in words at length and not abbreviated." (*Orosley* agt. *Cobb*, *ante*, 37.)

6. Section 66—Section 66 of the Code of Civil Procedure now gives an attorney a lien upon his client's cause of action, both before and after judgment in favor of the client, and at all intermediate stages of the cause of action. The lien is given upon the cause of action, and such lien attaches to any verdict, report, decision or judgment in his client's favor. The lien being upon the cause of action, must continue until a judgment is rendered in the action which is final, either for want of power to appeal or for failure to appeal in time, by which judgment it shall have been determined there was no cause of action, and so nothing to support a lien.

A client has not an absolute right to stop the litigation after

a judgment upon the merits has passed against the cause of action; but the right of a plaintiff to stop the litigation after an adverse judgment upon the merits, is subject to the attorney's lien for his costs and the attorney's approval.

The attorney has the right, at his own expense, to bring and prosecute an appeal from a judgment against his client, and against the wishes of such client, in order that the attorney may, if successful upon the appeal, obtain a new trial and a favorable judgment, and a chance of collecting his costs from the opposite side by means of such judgment. (*Adsit* agt. *Hall*, *ante* 378.)

7. Section 84—Where the plaintiff procured from the reporter a copy of the evidence, whose fees were allowed as an item of disbursement in the bill of costs, as taxed, and the affidavit as to the disbursements, which was made by the plaintiff's attorney, states that the items of disbursements set forth in the bill were "actually made and incurred," the trial judge made a certificate that, on the trial, he directed the stenographer's minutes to be furnished the court, and that the reporter's fees be taxed as a disbursement:

Held, that as it did not appear that the court used the copy procured by the plaintiff, or that it was obtained by him for that purpose, the item should have been disallowed. (*Pfandler Baun Bunging Apparatus Co.* agt. *Pfandler et al.*, *ante*, 258.)

8. Section 191—It is not essential to the validity of an order of the general term allowing an appeal to this court, in the cases wherein an appeal is not permitted except when so ordered, that the general term making the order shall be composed of the same judges who constituted the general term which decided the case. The only restriction upon the power of the general term to

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make the order is that it shall be "made at the general term which rendered the determination or at the next general term after judgment is entered thereupon." (*Third Avenue R. R. Co. agt. Ebling et al.*, 100 N. Y., 98.)

9. Section 294—Supplementary proceedings—defects in the affidavit cannot be taken advantage of in collateral proceedings—power of a county judge to direct money to be paid over to a claimant. (*See Coonan agt. Board of Education of Rochester*, 87 Hun, 96.)

10. Section 882, sub. 7—Justices' judgment—no time is prescribed within which a transcript must be filed in the county clerk's office—subdivision 7 of section 882 of the Code of Civil Procedure does not limit the right of a party to issue an execution on a judgment so docketed. (*See Rose agt. Henry*, 87 Hun, 897.)

11. Section 890—Except as limited by section 890 of the Code of Civil Procedure, that section extends to non-resident debtors the protection of the Statute of Limitations in all cases where it has run according to the laws of the debtor's residence.

In determining this question the foreign law, as interpreted by the local courts of the state is invoked, must prevail. In other words, under our Code foreign debtors are allowed to bring with them the protection which their home government gives them while there—nothing more.

The courts of this state will not construe foreign statutes, but must accept the interpretation the local courts of the particular state place upon them. Each state is the best interpreter of its local laws. (*Howe agt. Welch*, ante, 465.)

12. Section 895—Statute of limitations—when a letter is a sufficient acknowledgment of a debt within

this section of the Code of Civil Procedure. (*See McCahill agt. Mehrbach*, 87 Hun, 504.)

18. Section 425—In an action of trespass where the question was as to the validity of a title under a comptroller's deed the proof of publication in the state paper of notice of sale to take place November 12, 1866, showed that it was published "once in each week for ten weeks successively, commencing on the 20th of July, 1866, and ending 21st September, 1866." *Held*, the proof sufficiently showed publication for the "space of ten weeks" as required by the statute (*see Code of Civ. Pro.*, sec. 425); that a publication on the first day of the tenth week covered the whole week.

Where a weekly publication of a notice is required, it is not necessary to show publication on the same day of each week; it is sufficient if made on any day of each week for the requisite number of weeks. (*Wood agt. Knapp*, 100 N. Y., 109.)

14. Sections 440, 442, 443-723—

Where, in proceedings for the service of the summons in an action upon parties without the state by publication, the requirements of the statute were complied with except that when a copy of the summons and complaint was mailed to each non-resident named in the order, notice accompanying the copy summons so mailed, instead of being the notice that was published with the summons, stating that the summons was served by publication, pursuant to an order of the judge who made it, was a notice that the summons was served without the state of New York, pursuant to the order of the judge, and except that the notice which was published failed to be directed to the defendants alone who were to be served with the summons by publication.

Held, that the failure to comply with the requirements of the Code in these respects, did not so far invalidate the service as to deprive

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- the court of jurisdiction over these absent defendants. (*Loring* agt. *Binney*, ante, 120.)
15. Sections 442, 443—Service of summons by publication—defects in the notice attached to the summons—when they do not prevent the court from acquiring jurisdiction. (*See Loring* agt. *Binney*, 38 *Hun*, 152.)
16. Section 449—When an action may be continued in the name of the original plaintiff after he has made a general assignment—Code of Civil Procedure, sec. 756. (*See Lawson* agt. *Town of Woodstock*, 37 *Hun*, 352.)
17. Sections 449, 1814—Where an executor or administrator has sold, on credit, property of the estate, he may bring an action in his own name to recover the debt, and in such an action a debt against the decedent may not be made the subject of a counter-claim.
The old rule in this respect has not been changed by the provisions of the Code of Civil Procedure (sec. 449), requiring every action to be brought by the real party in interest, and (sec. 1814) that an action commenced by an executor or administrator upon a cause of action belonging to him as such must be brought by him in his representative capacity. The debt does not belong to him in his representative capacity, within the meaning of the Code, and he, as an individual, is the real party in interest. (*Thompson* agt. *Whitmarsh*, 100 *N. Y.*, 85.)
18. Section 466—A person suing as a poor person may appeal—the privilege of so suing does not extend to such appeal. (*See Moore* agt. *City of Troy*, 38 *Hun*, 301.)
19. Sections 469, 470, 476—A general guardian cannot sue in his own name to recover any personal property of his ward. The action must be brought in the name of the infant by means of a guardian ad litem. Sections 468, 469, 470, 472, 474, 476. (*Buermann* et al. agt. *The New York Produce Exchange* et al., ante, 393.)
20. Section 481, sub. 2—Joinder of several causes of action arising out of the same transaction—when the plaintiff will not be compelled to elect upon which he will proceed. (*See Blank* agt. *Hartshorn*, 37 *Hun*, 131.)
21. Section 500—Pleading—a defendant may deny allegations of the complaint upon information and belief—Code of Civil Procedure, secs. 524, 526. (*See Wood* agt. *Raydure*, 39 *Hun*, 144.)
22. Section 501—Counter-claim—when it grows out of the plaintiff's cause of action. (*See Lorche* agt. *Brasher*, 37 *Hun*, 385.)
23. Section 523—A complaint in an action against a trustee to charge him with a corporate debt by reason of the failure to file an annual report, when verified requires a verified answer. (*Gadsden* agt. *Woodward*, ante, 109.)
24. Sections 523, 537—Action against a trustee of a corporation for a failure to file a report—the defendant cannot file an unverified answer. (*See Gadsden* agt. *Woodward*, 38 *Hun*, 548.)
25. Sections 524, 526—Pleading—a defendant may deny allegations of the complaint upon information and belief—Code of Civil Procedure, sec. 500. (*Id.*)
26. Section 542—Amendment to complaint—not allowed so as to change the venue thereby. (*See Rector* agt. *Ridgwood Ice Co.*, 38 *Hun*, 293.)
27. Sections 549, 550—Where a complaint alleged a delivery to defendant, a commission merchant, of goods to be sold for cash, for plain-

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tiff, to whom the proceeds, after deducting commissions, were to be paid; that defendant sold the goods but refused to pay over the amount due and converted it to his own use.

Held, that the action was upon contract, and the allegation of conversion of the proceeds was mere surplusage; and a ground of arrest based upon a claim that defendant acted in a fiduciary capacity is extrinsic to the cause of action, so that a motion on affidavits at special term to vacate the order of arrest should have been decided on the merits, and it was error for the court to refuse to pass upon the question, deeming it a proper one for the jury on the trial of the action. (*Donovan agt. Cornell, ante, 99.*)

28. Sections 549-559—Where an order of arrest is obtained in an action where the cause of action and cause of arrest are identical, and the order of arrest is vacated on motion, and the plaintiff on the trial withdraws by stipulation the allegation of fraud from the complaint.

Held, that the order vacating the order of arrest became the final decision that the plaintiff in said action was not entitled to the order of arrest, and an action was maintainable upon the undertaking for damages sustained by reason of the arrest. (*Rothnell agt. Paine et al., ante, 187.*)

29. Section 550, sub. 2—Where a factor mingles the proceeds of sales indiscriminately with his own funds, and by usage pays by his check on Saturday for all merchandise delivered during the week, whether the same were then sold or unsold, the relation of the parties is not a fiduciary one within the meaning of subdivision 3 of section 550 of the Code, but an ordinary one of debtor and creditor and an order of arrest issued in such

a case cannot be upheld. (*Donovan agt. Cornell, ante, 525.*)

30. Section 550, sub. 4—Execution against the person—when it may be issued to collect costs. (*See Smith agt. Duffy, 37 Hun, 596.*)

31. Section 626—Injunction—motion to vacate, without notice, at general term—in what cases such a motion can be made (*See Gere agt. N. Y. C. and H. R. R. Co., 38 Hun, 231.*)

32. Sections 635, 3343—In an action to recover the purchase price of goods sold and delivered, an attachment may issue and will be sustained, notwithstanding that it is alleged in the complaint, and also stated in the affidavits, that fraudulent representations were made concerning the financial condition of the business by which the plaintiffs were induced to sell and deliver the goods.

The case of *Witten agt. Von Minden* (27 Hun, 234) commented on and explained.

Copies of affidavits made and filed in another action against the same defendants, brought by another plaintiff, may be used to sustain an attachment, where an inability to obtain affidavits in the action from persons whose affidavits were made in the other suit is shown. (*Whitney et al. agt. Hirsch et al., ante, 172.*)

33. Sections 635, 636—Attachment—what facts must be stated in the papers therefor. (*See Edick agt. Green, 38 Hun, 202.*)

34. Section 635—Attachment—in what actions it may be issued—when affidavits made in another action may be used on a motion for an attachment. (*See Whitney agt. Hirsch, 39 Hun, 825.*)

35. Section 636—The affidavit to obtain an attachment, when made by plaintiff's attorney, and which al-

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leges that there is due these plaintiffs * * * over and above all counter-claims known to deponent, as deponent is informed and believes, is wholly insufficient.

An affidavit by one of several plaintiffs that the sum mentioned is due, over and above all counter-claims known to him, is sufficient.

It does not affect the jurisdiction of the court in granting the second attachment, that the same affidavit was used in obtaining the first. (*Acker et al. agt. Jackson, ante, 160.*)

86. Section 640—Sureties upon an undertaking for an attachment—they are liable for costs awarded to the defendant, although the attachment is not formally vacated (*See Lee agt. Homer, 37 Hun, 634.*)

87. Section 649—Attachment—levy on property capable of manual delivery, made by its being taken into custody by the sheriff. (*See Adams agt. Speelman, 39 Hun, 35.*)

88. Sections 677, 678, 679—Where an action is brought by an attaching creditor jointly with the sheriff who levied the attachment, against a creditor of the defendant in the attachment, to recover a claim attached, in aid of the attachment, pursuant to sections 677, 678 and 679 of the Code of Civil Procedure, and which is defended upon the ground that the demand was assigned prior to the levy of the attachment, it seems inquiry cannot be made into the question whether or not the transfer was fraudulent as against the attaching creditor.

No lien is created by the levy of an attachment upon a claim, unless the legal title to the demand is in the attachment debtor at the time of the levy.

Where there has been no formal transfer of the title to a demand levied upon under an attachment, it becomes a mixed question of

fact and of law whether or not a transfer has been effected.

In such a case, whether or not a present appropriation of a debt or demand has been effected, so as to constitute a legal or an equitable assignment, is a question of intention, to be submitted to the jury, as matter of fact, for their determination, upon the language used by the parties, written or verbal, and the surrounding facts and circumstances. (*Throop Grain Cleaner Co. agt. Smith, ante, 290.*)

89. Sections 682, 1296—Within the meaning of the provision of the Code of Civil Procedure (*sec. 1296*), which declares that "a person aggrieved, who is not a party" to an action or proceeding, but who is entitled to be substituted in place of a party, may appeal from a judgment or order; a person is not "aggrieved" unless the judgment or order has binding force against his rights, his person or his property; the fact that it may remotely or contingently affect interests which he represents does not give him a right to appeal.

A receiver appointed in supplementary proceedings is not entitled to be substituted as defendant in place of the judgment debtor in an action brought by other creditors against him.

It seems that said provision contemplates mainly, if not exclusively, cases where the party to the record is merely a nominal one, and the real party in interest is the one aggrieved, or where, since the judgment or order, there has been in some way a devolution of the entire interest upon some person not a party.

On March 7, 1884, an attachment and order of arrest were issued herein, which were executed the next day; on March 19 defendant obtained an order to show cause why they should not be vacated, the motion was denied, and on March 28 defendant appealed from the order. On March 24 other cred-

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itors obtained a judgment against defendant. Supplementary proceedings were instituted thereon, which resulted in the appointment of D. as receiver of defendant's property on June 4. On June 27 the appeal from the order was argued. On July 12 defendant, without the presence of his attorney, offered judgment for the entire amount claimed, and stipulated that an order should be entered dismissing the appeal, and on July 14 an *ex parte* order to that effect was entered, the offer of judgment was accepted and judgment was entered. Notwithstanding this the general term affirmed the order appealed from. An order of affirmance was entered by D., and the defendant's attorney, who appealed therefrom in defendant's name, to this court, and moved to substitute D. as defendant. *Held*, that D. was not entitled to appeal or to be substituted.

It seems that the remedy of the receiver, if any, was under the provision of the Code of Civil Procedure (*sec.* 682), authorizing a person who has acquired an interest in attached property to move to vacate or modify the attachment, or if the judgment and proceedings herein were collusive and fraudulent as against the other creditors of defendant, to institute an equitable action to set them aside. (*Ross* agt. *Wing*, 100 *N. Y.*, 248.)

40. Section 728—Foreign administrator—jurisdiction of the courts of this state over an action against him—practice—amendment of a clerical error in an affidavit. (*See Murphy* agt. *Hall*, 88 *Hun*, 528.)

41. Section 732—*It seems* the provision of the Code of Civil Procedure (*sec.* 732) in reference to tenders refers only to that class of tenders which satisfy and discharge the debt. (*Cass* agt. *Higenbotam*, 100 *N. Y.*, 248.)

42. Section 756—When an action

may be continued in the name of the original plaintiff after he has made a general assignment—Code of Civil Procedure, *sec.* 449. (*See Lawson* agt. *Town of Woodstock*, 37 *Hun*, 352.)

43. Section 779—An attorney has a lien on motion costs ordered in favor of his client, and as equitable assignee thereof, which lien attaches the instant the costs are due.

Where an order was made at special term, on motion of counsel for defendant, "that an allowance of \$500 is granted to the defendant against the plaintiff, as executor, together with the costs of this action, costs and allowance not to be paid by plaintiff personally;" and on defendant's motion this order was reconsidered and reaffirmed and this decision was sustained by the general term, the defendant appealing to the court of appeals who dismissed the defendant's appeal, with \$116.02 costs to the plaintiff:

Held, that the costs allowed to this plaintiff are motion costs and cannot be offset against any costs in the action due by the plaintiff to the defendant. That the plaintiff cannot pay the defendant out of money which legally belongs to the plaintiff's attorney, and that these costs are collectable from the defendant under section 779 of the Code of Civil Procedure. (*Place* agt. *Hayward*, *ante*, 59.)

44. Section 779—Right to issue a precept to collect the costs of a motion—when the order is served by mail the party has twenty days within which to pay them. (*See Wellmore* agt. *Frost*, 88 *Hun*, 389.)

45. Section 780—Where an account or bill is presented to a board of supervisors which is not sufficiently full in details or sufficiently verified, it should be returned to the claimant, to the end that he may make such amendments and corrections as are suitable and proper for

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the purpose of complying with the statutes.

Where, as in this case, the board might have required a more detailed statement of the expenditures than was given in the account as presented, yet where instead of rejecting the claim as they might have done, they proceeded to act upon it and investigate it and to a certain extent allowed it, their action will not be interfered with by mandamus.

The discretion of the board as to auditing and allowing accounts ought not to be taken away or interfered with or absolutely directed by the court.

Where a board of supervisors has acted upon a claim and passed upon its merits, the action is conclusive upon the claimant and succeeding boards. It is binding and effectual to shut off a suit for a portion of or a balance of a claim thus presented and acted upon. The allowance of an account by the board is a judicial act, and is in the nature of a judgment against the county.

If a party is not satisfied with an audit of his claim, he should review it or take such remedy as remains to him before accepting the award. By an acceptance of the audit and the order issued in accordance with it, he adopts and ratifies the proceedings had in regard thereto. They thus become mutual and operative upon the creditor and debtor.

Whether in this case a mandamus is a proper remedy if a wrong has been done, *quære*.

Under section 780 of the Code of Civil Procedure a county judge cannot make an order requiring a party to show cause why an application should not be granted which is returnable in less than eight days at a special term of the supreme court. (*People ex rel. Brown* agt. *Board of Supervisors of Herkimer Co.*, ante 241.)

46. Section 814—The provision of

the Code of Civil Procedure (sec. 814), authorizing an action for a breach of the condition of a bond given in the course of "an action or special proceeding" has no application. (*Haight* agt. *Brislin et al.*, 100 N. Y., 219.)

47. Section 820—Where two claimants each claim the price of certain goods alleged by each of them respectively to have been sold and delivered by him to the purchaser.

Held, that (the necessary facts required by section 820 of the Code of Civil Procedure being shown) the purchaser is entitled to interplead them and be discharged from liability to either.

Sherman agt. *Partridge* (4 *Duer*, 646) and *Trigg* agt. *Hus* (17 *Abb. Pr.*, 486) distinguished.

The principle laid down in *Baltimore and Ohio R. R. Co.* agt. *Arthur* (80 N. Y., 237) followed. (*Tynan* agt. *Cadenas*, ante, 78.)

48. Section 829—Evidence—transaction with a deceased person—what testimony does not relate thereto within the meaning of this section of the Code of Civil Procedure. (*See Saratoga County Bank* agt. *Leach*, 87 *Hun*, 336.)

49. Section 829—Evidence—when an agent cannot testify as to services rendered to a deceased principal or the non-payment therefor. (*See Lerche* agt. *Brasher*, 87 *Hun*, 335.)

50. Section 829—Evidence—when a party cannot testify as to the address on a package sent by express to a person since deceased (*See Stuart* agt. *Patterson*, 87 *Hun*, 113.)

51. Section 829—Evidence—when a party may testify to an extrinsic fact, which may tend to show that he has not had a certain personal transaction with a deceased person. (*See McKenna* agt. *Bolger*, 87 *Hun*, 526.)

52. Section 829—Evidence—testimony as to the genuineness of the

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- signature of a deceased person—when inadmissible under this section of the Code of Civil Procedure. (*See Garvey agt. Owens, 37 Hun, 498.*)
53. Section 829—Evidence—when a party may testify as to the value of services rendered by him to a deceased person. (*See Burrows agt. Butler, 38 Hun, 157.*)
54. Section 829—Evidence—when inadmissible as calling for a personal communication with a deceased person. (*See Campbell agt. Hubbard, 28 Hun, 306.*)
55. Section 829—A stockholder of a corporation defendant cannot testify in its behalf as to a personal transaction with the plaintiff's testator. (*See Keller agt. West, Bradley & Cary Mfg. Co., 39 Hun, 348.*)
56. Section 829—Evidence—when inadmissible as involving a personal transaction or communication with a deceased person. (*See Viall agt. Leavens, 39 Hun, 291.*)
57. Section 829—When a witness is not interested within the meaning of. (*See Murray agt. Fox, 39 Hun, 108.*)
58. Section 829—Where a party, who is excluded by the Code of Civil Procedure (*sec. 829*) from testifying in his own behalf as to a personal transaction with a deceased person, upon cross-examination of the adverse party draws out testimony in regard to such transaction, this does not bring him within the exception to the prohibition and permit him to testify; as in such case the adverse party is not "examined in his own behalf" within the meaning of the exception. (*Corning agt. Walker, 100 N. Y., 547.*)
59. Sections 834-836—Evidence—a physician cannot testify as to information acquired while attending a patient—no one but the patient can waive the privilege. (*See Renihan agt. Dennin, 38 Hun, 270.*)
60. Section 834—Where a physician is selected by the public prosecutor, and sent by him to a prisoner after a crime has been committed, and she accepts his services in a professional character, disclosures made by her to him are privileged communications, and this rule applies to all actions, civil or criminal. The opinion of such physician as to whether an abortion has been committed, founded partly on such statements, is also inadmissible. Although the prisoner was a party to the crime (abortion) and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gesta*, were not admissible. (*People agt. Murphy, ante, 469.*)
61. Section 835—When an attorney cannot refuse to testify as to a transaction had with his client on the ground that it was privileged. (*See Foster agt. Wilkinson, 37 Hun, 242.*)
62. Section 837—A complaint in an action against a trustee to charge him with a corporate debt by reason of the failure to file an annual report, when verified requires a verified answer. In such an action the defendant would be obliged to testify, if called as a witness, against himself and is not privileged under section 837 of the Code; disproving *Hughan agt. Woodward* (2 *How. Pr. [N. S.]*, 127.) (*Gadsden agt. Woodward, ante, 109.*)
63. Sections 837, 523—Action against a trustee of a corporation for a failure to file a report—the defendant cannot serve an unverified answer. (*See Gadsden agt. Woodward 38 Hun, 548.*)
64. Section 854—In proceedings be-

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- fore a referee supplementary to execution, a subpoena should be issued by and under the hand of the referee, pursuant to this section of the Code of Civil Procedure. (*Knowles* agt. *De Lazare*, ante, 85.)
65. Section 854—Supplementary proceedings—subpoenas to witnesses should be under the hand of the referee before whom they are to testify. (*See People ex rel. Jacobs* agt. *Ball*, 37 *Hun*, 245.)
66. Section 870—The Code of Civil Procedure authorizes an order for the examination of a person against whom an action is about to be brought, upon the application of the person who is about to bring such action, but before it has been actually commenced. (*Merchants' National Bank* agt. *Sheehan*, ante, 248.)
67. Section 870—Where the complaint is on a promissory note and no answer has been put in, and it is sought to examine the defendant as to the consideration of the note, the plaintiff should show a reasonable expectation on his part that the consideration is to be denied, to entitle him to the order. (*Kane Clark*, ante, 270.)
68. Section 870—Under section 870 of the Code of Civil Procedure, an order may be granted to the plaintiff for the purpose of examining a person against whom he proposes to bring an action, but the granting of such order is entirely in the discretion of the court. (*Merchants' Nat. Bank* agt. *Sheehan*, ante, 450.)
69. Section 870—Examination of a party before trial—only allowed to enable the applicant to establish his own case. (*See Adams* agt. *Cavanaugh*, 37 *Hun*, 232.)
70. Sections 872, 873—The recorder of the city of Watertown has power, and may make an order, for the examination of a defendant under sections 872 and 873 of the Code of Civil Procedure. (*Babcock* agt. *Balston*, ante, 280.)
71. Section 872—Order for the examination of a party before trial—when one partner seeking to compel a settlement of partnership accounts, may examine a defendant co-partner—the sworn denial by the party sought to be examined, of any information as to the subject of the examination, does not constitute a ground for denying the application. (*See Davis* agt. *Stanford*, 37 *Hun*, 531.)
72. Section 873—Proceedings to punish for contempts—distinction between civil and criminal contempts—Code of Civil Procedure, tit 3, chap. 17. (*See King* agt. *Flynn*, 37 *Hun*, 329.)
73. Sections 887, 888—A commission to take testimony may issue upon a reference of a disputed claim against an estate—R. S., part 2, chap. 6, title 3, art. 2, secs 36, 37. (*See Paddock* agt. *Kirkham*, 38 *Hun*, 376.)
74. Section 895—An open commission cannot be allowed where the testimony is to be taken elsewhere than in the United States or in Canada.
On an application for an open commission, where the witnesses that the defendants proposed to examine did not reside in Florida, nor did it appear that they were at the time of such application in that State, but it did appear that they resided in the island of Cuba:
Held, that such an order should not be granted unless it was made to appear that such a commission was absolutely necessary for the protection of the applicant's rights. (*Purdy et al.* agt. *Webster*, ante, 263.)
75. Section 969, 968, 1013—Actions to set aside fraudulent conveyances.

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transfers, releases and settlements should be tried by the court.

Under section 1018 whether to refer or refuse the reference is addressed to the discretion of the court. It is obviously the purpose and theory of the law that equity actions are to be tried by the court.

Even in actions involving the examination of a long account, references are ordered, not as a matter of right or of favor to the parties, but for the convenience of the court, and the court cannot, for its own convenience in such cases, order a reference when there are difficult questions of law involved. (*Rochester* agt. *The Mayor, Aldermen, &c., of the City of New York*, ante, 527.)

76. Section 997—Practice—when a case must be made in order to enable the general term to review a judgment. (*See Delano* agt. *Harp*, 87 *Hun*, 275.)

77. Sections 999, 1002—An appeal from a judgment entered on a verdict must be determined solely upon exceptions taken on the trial. An exception can be taken only to a ruling by the trial court upon a question of law. Where there is no exception to a ruling of the court as to the sufficiency of the evidence to establish a fact in issue and the defeated party desires to move for a new trial, he must do so in the first instance before the trial court or at special term. Not having done this, no question affecting the merits or the sufficiency of the evidence to support the verdict may be raised at general term. An exception to the admission of evidence may only be taken when it is received against the parties' objection. (*Third Avenue R. R. Co.* agt. *Ebling et al.*, 100 *N. Y.*, 98.)

78. Section 1011—Under section 1011 of the Code of Civil Procedure, as amended by chapter 542 of the Laws of 1879, it is imperative on the court to appoint another referee

where a new trial is granted in an action tried before a referee named in the stipulation to refer, "unless the stipulation expressly provides otherwise." (*Carter* agt. *Wallace*, ante, 850.)

79. Sections 1027, 1082, 1083, 1116, 1180—A citizen of the city of Troy is qualified to sit as a juror by chapter 1, section 16, Laws 1816, in an action against such city; and the rejection by the court of such juror, otherwise competent, is ground for reversal, although the jurors who actually tried the cause were competent. Parties have the right to have the first twelve competent jurors drawn who are indifferent, and not discharged or excused, constitute the jury. (*Hildreth* agt. *City of Troy*, ante, 488.)

80. Sections 1085, 1051, 1058, 1059—A challenge to the array, on the ground that the names of additional jurors were not properly drawn, will not be sustained, if the jurors were drawn "in open court," and "from the box directed by the court," even though no directions were given by the court, except by the formal order entered, where that specified the box as the one "containing the names of the trial jurors for said court." The fact that the other two boxes were not in court is a mere formal irregularity. (*People* agt. *Kieman*, ante, 264.)

81. Section 1212—Action against a trustee of a corporation for a failure to file a report—such an action being *ex delicto*, the clerk cannot enter judgment on default under said section. (*See Gadsden* agt. *Woodward*, 88 *Hun*, 548.)

82. Section 1214—A complaint in an action against a trustee to charge him with a corporate debt by reason of the failure to file an annual report, when verified requires a verified answer.

In such an action the defendant

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would be obliged to testify, if called as a witness, against himself and is not privileged under section 887 of the Code; disproving *Hughan* agt. *Woodward* (2 *Hov. Pr.* [N. S.], 127.)

The action is not one specified in 1214 of the Code, and judgment cannot be entered by application to the clerk, but an application must be made to the court.

Where a defendant is served with a verified summons and complaint in an action to charge him as a trustee of a corporation with a corporate debt, by reason of the failure of the corporation to file an annual report, he must serve a verified answer and the plaintiff will not be compelled to receive an unverified answer.

Where the plaintiff, in such an action, upon the service of an unverified answer to a verified complaint, returned the answer with notice that the plaintiff elected to treat it as a nullity and thereupon entered judgment without application to the court. *Held*, that the order of the special term refusing to vacate such a judgment was erroneous, and that the judgment should be vacated because the action was not an action on contract within the meaning of section 1214 of the Code. (*Gadsden* agt. *Woodward*, ante, 109.)

83. Sections 1214, 1215, 1183, 8194—The action is for negligence, and the trial judge dismissed the complaint. Upon appeal the general term of the city court reversed the judgment and ordered a new trial. The defendants thereupon appealed to the court of common pleas, giving a stipulation for judgment absolute. The common pleas affirmed the order of the city court, general term, and gave "judgment absolute" in favor of the plaintiff:

Held, that as the damages were unliquidated, the assessment thereof must be had at the trial term before a jury.

Sections 1214 and 1215 of the Code apply only to applications

for judgment by default, and even in those cases the "writ of inquiry" may be executed at trial term if so directed. (*O'Donnell* agt. *Hecker et al.*, ante, 384.)

84. Section 1274, sub. 2—Judgment by confession—when the statement of the facts out of which the debt arose is insufficient. (*See Citizens' Nat. Bank* agt. *Allison*, 87 *Hun*, 13.)

85. Sections 1801, 1816—To review an interlocutory judgment on an appeal from a final judgment, the former must be specified in the notice of appeal—the court cannot amend the notice by inserting such reference. (*See Patterson* agt. *McOunn*, 38 *Hun*, 531.)

86. Section 1809—The omission of an attorney to indorse upon papers served or filed his post-office address or place of business, as required by rule 2 of the supreme court, is a mere irregularity, and entitles the party served either to return the paper or move to set it aside; but after receiving it without objection, he cannot safely disregard the functions which the paper is designed to perform.

Section 1039 of the Code of Civil Procedure requires a notice of ten days of entry of judgment before bringing an action against the sureties on appeal; but if such notice, without the indorsement of the attorney's address is accepted by the opposing attorney, and not returned, he waives the defect, and cannot afterwards defeat such action by pleading that the required notice has not been given. (*Hirans et al.* agt. *Baker et al.*, ante, 504.)

87. Sections 1865, 1872—Execution against the person of a defendant—what recitals it must contain—Code of Civil Procedure, sec 1489. (*See O'Shea* agt. *Kohn*, 38 *Hun*, 149.)

88. Sections 1875-1877—Order for the examination of a judgment

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debtor—Code of Civil Procedure, sec. 2436—the regularity of the issue of the execution must be shown. (*See Hudson agt. Weld*, 88 Hun, 142.)

89. Section 1465—Redemption by a mortgagee from a sale on execution—what is a sufficient statement of the amount due. (*See People ex rel. Van Buskirk agt. Olar*, 87 Hun, 201.)

90. Section 1469—Execution against the person of a defendant—what recitals it must contain—Code of Civil Procedure, secs. 1865, 1872. (*See O'Shea agt. Kohn*, 88 Hun, 149.)

91. Section 1502—As to who is the "actual occupant" of premises at the commencement of an action for ejectment, and so a proper defendant (2 R. S., 304, sec. 4, *new Code of Civil Procedure*, sec. 1502), is a question of fact for the jury; and when the title was in the wife they might properly find that she was the "actual occupant," even though her husband cultivated the soil, &c. (RAPALLO and EARL, JJ., dissent.) (*Martin agt. Reclor*, ante, 361.)

92. Section 1525—Action of ejectment—power of the court to set aside a second judgment. (*See Keeler agt. Dennis*, 89 Hun, 18.)

93. Section 1538—A tenant in common may join his wife as a co-plaintiff in an action for partition. (*See Foster agt. Foster*, 88 Hun, 366.)

94. Sections 1544, 1546, 1561, 1579—In an action of partition, where issues of fact are presented by the pleadings as to part of the lands sought to be partitioned, which issues (after the plaintiff has demanded a jury trial in accordance with section 1544 or the Code) are dismissed by the defendants by default before the jury side of the court, it is error for the defendants to enter judgment dismissing the entire cause of action, including

that arising from the lands admitted by the answer to be owned by the parties in common.

The proper practice after the issues are determined in such a case before the jury side, is to have the case go to special term, and after a referee's report (*see Code*, secs. 1561 and 1546) as to liens, &c., on the lands admitted to be held in common, interlocutory judgment should be given (*see Code*, sec. 1546) of partition as to the latter lands, and for the defendants as to the issues.

After the defendant's informal judgment by default had been vacated merely because of its informality, on the plaintiff's moving for such a reference as to the lands admitted to be owned in common, the defendants could not have the issues referred to the referee. (*Curry agt. Colgan*, ante, 26.)

95. Section 1671—Notice of pendency of action—a party whose deed was delivered before, but is recorded after, the filing thereof is bound by the judgment. (*See Kindberg agt. Freeman*, 89 Hun, 466.)

96. Sections 1780, 1781, 3228, 968, 969, 971, 972, 1225—Where plaintiff brought an action asking for the return of, and damages for the retention of, certain valuable papers, and the case was tried as one of replevin, and the jury rendered a verdict for plaintiff, awarding him the title, and thereafter plaintiff obtained an *ex parte* order for judgment, and that defendant deliver the papers, and that costs be taxed, and on the same day plaintiff entered judgment for costs and afterwards the judge struck the costs from the judgment on the ground that it was an action in replevin. On appeal from an order made on a motion of defendant to set aside the order and judgment:

Held, that the proceedings were irregular, either as an action of replevin or in equity, to compel specific performance; that the judg-

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ment, and order for judgment, should be set aside, and the case stand as it was after the verdict was rendered; and if the court desire to hear it as an equitable action, it might do so. (*Hammond* agt. *Morgan*, ante, 458.)

97. Section 1748, sub. 4—Marriage—when declared void because the consent of the woman was procured by false and fraudulent representations—what is the age of legal consent within subdivision 1 of said section—Penal Code, sec. 282. (*See Moot* agt. *Moot*, 87 *Hun*, 288.)

98. Section 1775—In an action against certain corporations where it was averred that the plaintiff is informed and believes that the said last named defendants respectively, except the said defendant the New York Newspaper Union, were and are foreign corporations, companies or associations, &c., but did not state under the laws of what state, country or government the said defendant was created. On demurrer:

Held, that the complaint was bad as not stating the facts required to be stated by section 1775 of the Code of Civil Procedure, and that as it appeared by the complaint that certain defendants were foreign corporations the objection could be taken by demurrer. (*Clegg* agt. *Cramer et al.*, ante, 128.)

99. Section 1778—Practice—a municipal corporation is not a "domestic" corporation within this section of the Code of Civil Procedure. (*See Moran* agt. *Long Island City*, 38 *Hun*, 122.)

100. Section 1784—Receiver of a corporation—power of the court to cure an omission to give notice to the attorney general, by directing an order to be entered *nunc pro tunc*. (*See Morrison* agt. *Menhaden Co.*, 37 *Hun*, 522.)

101. Section 1785—In an action to dis-

solve a corporation brought under the provisions of section 1785 of the Code of Civil Procedure, is not material whether the defendant is a manufacturing, &c., corporation or not, as the section refers to all corporations created by or under the laws of the state

When the dissolution is claimed by reason of the insolvency of the corporation and the complaint, in addition to an allegation that the defendant has been unable to meet its obligations, and that it has failed to pay a certain judgment, which the answer alleges has been paid, it alleges that the said defendant has not a dollar in its treasury, and is insolvent and has been for at least a year past, the answer not denying this allegation, but alleging payment of the judgment and averring that the said company has no liability to creditors by way of judgments unsatisfied;

Held, that, on the pleadings the plaintiff is entitled to judgment.

Insolvency means a general inability to answer in the course of business the liability existing and capable of being enforced. A corporation, like an individual, is insolvent when it is not able to pay its debts. It may be insolvent although no judgments have been recovered against it. (*People, &c., of New York* agt. *Excelsior Gas-Light Co.*, ante, 187.)

102. Section 1822—The surrogate's court has jurisdiction to determine whether the demand of a creditor, claimed by an executor or administrator to be barred by section 1822 of the Code of Civil Procedure, has, in fact, been "disputed or rejected" within the meaning of that section. (*Estate of Lange*, ante, 162.)

103. Section 1915—Construction of an agreement for arbitration—right to recover the amount named in a bond as a penalty—2 R. S. (*Edm. ed.*), 392, 393, secs. 5, 11—Code of Civil Procedure, sec. 3847, sub. 11.

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(*See Republic of Mexico agt. Ockerhausen*, 87 Hun, 533.)

104. Sections 1949, 1968—Action to try title to office—effect of not denying unnecessary allegations in a complaint—title to office can only be questioned by the people. (*See People ex rel. Cornell agt. Knox*, 28 Hun, 236.)

105. Section 2081—Under the provisions of the Code of Civil Procedure in reference to the writ of *habeas corpus* (sec. 2081 *et seq.*; *see, also, similar provisions of Revised Statutes*, 2 R. S. 567, sec. 88 *et seq.*), it is the duty of the court or judge issuing the writ, upon a hearing on return thereto, where it appears the prisoner is held in custody under a judgment or decree, to inquire into the jurisdiction of the tribunal to render the judgment or decree, and to discharge the prisoner where it appears there was a lack of jurisdiction over the person or the subject-matter. (*People ex rel. Frey agt. The Wardens, &c., et al.*, 100 N. Y., 20.)

106. Sections 2100-2265—Where a petition in summary proceedings presents such a case as the officer can consider, a writ of prohibition will not lie.

Where L. presented a petition to a justice of the peace, praying for the removal of a tenant from certain premises under the provisions of the Code of Civil Procedure, concerning summary proceedings to recover possession of real estate, and the justice issued a warrant which was served upon the tenant, and on the return day he appeared and filed an answer denying each and every material allegation, and also set up new matter, going to the question of title; the petitioner demurred to the answer that it contained no defense, which demurrer was sustained, and a final order granted awarding possession to petitioner, and directing the issuing

of a warrant, which was issued and delivered to the sheriff:

Held, that a writ of prohibition would not lie.

Held, further, that the question in the case really is, whether the justice erred in sustaining the demurrer of the petitioner to the answer of the relator. That question cannot be determined by writ of prohibition. It can be by appeal, and, in a proper case, there is a remedy by injunction. (*People ex rel. Evans agt. Letson*, ante, 381.)

107. Section 2141—The provision of the Code of Civil Procedure (sec. 2141), authorizing the court, upon a hearing on return to a writ of *certiorari*, to "make a final order annulling or confirming, wholly or partly, or modifying the determination reviewed," does not authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion.

Said provision is to be read in connection with the preceding one (sec. 2140), which defines the questions which may be determined by the court upon *certiorari*, and simply gives power to correct an erroneous adjudication instead of reversing it absolutely.

Where, therefore, the general term, on *certiorari* to review an order of the board of fire commissioners of the city of New York dismissing the relator from service as fireman, modified the order by directing his suspension for six months, and there was no question of jurisdiction, procedure or evidence, giving to the general term jurisdiction to interfere with the order, *held error*. (*People ex rel. Kent agt. B'd of Fire Com'rs*, 100 N. Y., 82.)

108. Section 2'65—Discharge under the two-thirds act—the provisions of the statute as to the manner of service must be strictly complied with—when parol evidence to show

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- that the court acquired jurisdiction will not be received. (*See Billings agt. Pickert*, 89 Hun, 504.)
109. Sections 2204, 2206—Discharge of an insolvent from imprisonment—no limitation as to time beyond which the fraudulent transfers of a debtor cannot be proved. (*See Matter of Brown*, 89 Hun, 37.)
100. Section 2384—To whom the fine authorized by, should be paid. (*See King agt. Flynn*, 88 Hun, 329.)
111. Sections 2436-2447—The plaintiff issued execution on judgment against defendant, and the sheriff demanded payment of the execution. Then defendant made a general assignment, and thereafter the execution was returned unsatisfied, and a receiver was appointed on supplementary proceedings:
Held, that the judgment and execution and the demand of payment under the execution in its lifetime did not create a lien which can be enforced under sections 2436-2447 of the Code. (*Abel et al. agt. Anderson*, ante, 489.)
112. Section 2436—Order for the examination of a judgment-debtor—the regularity of the issue of the execution must be shown—also a demand upon the debtor and a refusal by him to apply the property. (*See Hutson agt. Weld*, 88 Hun, 142.)
113. Section 2459—Supplementary proceedings—a witness may be compelled to attend in a county other than that of his residence. (*See Foster agt. Wilkinson*, 87 Hun, 242.)
114. Section 2481—The provisions of the Code of Civil Procedure regulating the method by which a review of errors on a trial before a surrogate may be secured, and providing for a loss of a right of review unless such methods are regularly pursued, furnish and limit the only remedy against such errors.
- The power of a surrogate to open or vacate a decree of his court is limited to cases where "fraud, newly-discovered evidence, clerical error, or other sufficient cause" of a like nature are shown. (*In re Hawley*, 100 N. Y., 206.)
115. Sections 2514, 2726—The mere appearance of an interest is ordinarily sufficient to justify an order for an accounting by an administrator (1 *Bradf.*, 24). The surrogate has no jurisdiction to determine the validity of a release, and where its invalidity is sworn to will direct an accounting. An accounting has been ordered at the instance of a residuary legatee who had given a release to the executor (25 N. Y., 142). (*Estate of Duffy, deceased*, ante, 240.)
116. Sections 2558-2561—A surrogate has no authority to make an *ex parte* order, decreeing an allowance payable out of the estate to a special guardian of an infant unsuccessfully contesting the probate of a will; notice to the other parties interested in the estate is requisite.
 Costs may be allowed to a special guardian in such a case, but limited by, and only as specified in the Code of Civil Procedure (secs. 2558-2561.)
It seems that the compensation of the special guardian should come either from the infant or his estate, and that if any part of such estate was before the surrogate or under his control he might have ordered the compensation to be paid out of it. (*Matter of Will of Budlong*, 100 N. Y., 208.)
117. Sections 2563, 2570—Decree of surrogate—when appealable. (*See Matter of Gilbert*, 89 Hun, 61.)
118. Sections 2570, 2584, 1910—The surrogate having directed, in a case where one's right to be a party to a probate controversy was in dispute, that that issue should be inquired into and determined before the taking of any testimony in the

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matter of the factum of the will, a motion was made that a trial of all the issues proceed simultaneously.

Held, that an order denying such motion was not appealable.

Held, further, that a perfected appeal from an order denying a motion for taking by commission testimony without the state, though it concerned a "substantial right," within the meaning of section 2570 of the Code of Civil Procedure, did not operate as a stay of the trial of the probate controversy before the surrogate. (*Estate of Henry*, ante, 886.)

119. Section 2572—Sale of the real estate of a decedent to pay his debts—petition—what allegations it must contain—what are sufficient. (*See Matter of German Bank*, 89 Hun, 181.)

120. Sections 2605, 2605—Where an executor is empowered and directed by the will to sell real estate, in case of gross negligence or bad faith on his part in failing to perform this duty, the surrogate has power to remove him therefor, to compel him to account, and upon such accounting to charge him with any loss to the estate resulting from such negligence or bad faith. (*Haight agt. Brislin et al.*, 100 N. Y., 219.)

121. Section 2629—Evidence—certificate of a surrogate as to the probate of a will—when sufficient. (*See King agt. King*, 89 Hun, 220.)

122. Section 2648—Where an infant would be entitled, but for his infancy, to letters of administration with the will annexed, the guardian of such infant is entitled to letters unless disqualified for some cause specified in the statute. (*Estate of Elanek, deceased*, ante, 56.)

123. Sections 2685, 2482—In order to justify under section 268, or sections 2482 of the Code of Civil Procedure the revocation of letters of

administration or letters of guardianship upon the ground that such letters were obtained by a "false suggestion of a material fact," it must appear that such false suggestion was made to the tribunal by which such letters were granted. (*Estate of Corn, deceased*, ante, 857.)

124. Sections 2717, 2718—Surrogate's court—who may petition the court as a "creditor" for a decree directing his claim to be paid. (*See Hall agt. Dusenbury*, 88 Hun, 125.)

125. Section 2742—An adjudication made by a surrogate in a proceeding to which a minor, regularly represented in accordance with the practice of the court, was a party, has the same effect as a similar adjudication between adults, and his relief from an erroneous or irregular adjudication is the same except as to the time within which an application for relief from an irregular judgment must be made. (*In re Hawley*, 100 N. Y., 206.)

126. Sections 2807, 2817—The surrogate has the same jurisdiction in the case of a testamentary trustee, (*Id.*)

127. Section 2821—Upon an application for an appointment of a guardian of an infant, the surrogate has authority to direct that access to the infant shall be allowed by the guardian when appointed, to such persons as the surrogate may designate. (*Matter of Derickson Minors*, ante, 21.)

128. Sections 2863, 3228—The plaintiff sued for \$333.33, and the court found that the plaintiff was entitled to recover this sum, but the recovery was reduced by independent counter-claims to \$5.20:

Held, that as the sum total of the accounts of both parties, proved to the satisfaction of the court, exceeded \$400, a justice's court would not have had jurisdiction

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of the action, and for this reason the plaintiff was entitled to full costs. (*Lablache* agt. *Kirkpatrick et al.*, ante, 61.)

129. Section 8070—Costs on appeal from a judgment of a justice's court—to what cases this section applies. (*See Vanderwerken* agt. *Brown*, 88 *Hun*, 284.)

130. Sections 8228, 8229, 8230—Where upon the trial of an action in which interpleader was allowed under the Code, the plaintiff established title to part of the fund in court and the defendant to the balance, and on the pleadings each party denied all:

Held, that neither was entitled to costs "as of course," but that the award of costs in such cases rested in the discretion of the court. (*Oronin* agt. *Oronin*, ante, 184.)

131. Section 8229—Where in an action against two or more defendants the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs as of course.

The provisions of this section of the Code of Civil Procedure, that costs may be awarded in such case to a successful defendant in the discretion of the court, applies only where such successful defendant is not united in interest with those unsuccessful, and when he interposes a separate defense by a separate answer. The fact of not being united in interest standing alone is not sufficient; both circumstances must exist before costs can be awarded. (*Kraft* agt. *Wilson*, ante, 18.)

132. Section 8281—In an action for an assault and battery committed by two defendants, on a motion by defendant for leave to serve supplemental answer setting up the recovery and satisfaction of a judgment against another party for the same cause of action;

Held, that the provisions of section 8231 of the Code of Civil Procedure (for the recovery of but one bill of costs when several actions are brought for the same cause) applies to this class of actions; and plaintiff is not entitled to costs, but only to taxable disbursements which have not been incurred and were not included in the other case. (*Roberts* agt. *Warren*, ante, 524.)

133. Section 8284—Costs in an action of replevin—when the defendant is not entitled to costs, although he recovers back a part of the articles replevined by the plaintiff. (*See Kiburn* agt. *Loose*, 87 *Hun*, 287.)

134. Sections 8338, 8358—Where an assignee assaulted a security held by defendants to indemnify them against accommodation liabilities, assumed for the assignors and sought to strike it down as fraudulent and void, and failed in the principal purpose of his bill and was charged with costs payable "first out of the fund;" on motion for an extra allowance on the part of defendants, on the ground that the case was difficult and extraordinary:

Held, that the principles stated in *Burke* agt. *Candee* (63 *Barb*, 552) are applicable to this case and that an extra allowance should be made:

Held, further, that as the principal subject matter of the litigation was the chattel mortgage of \$26,000, and that having been sustained by the referee, upon that it is proper to make the allowance:

Held, also, that three per cent. on the \$26,000 is a suitable sum to compensate the parties for the expenditures of skill, labor and professional ability required by the protracted trial. (*Couch* agt. *Milard et al.*, ante, 23.)

135. Section 8251—A motion for a new trial upon the grounds of surprise and newly discovered evidence, is not a motion on a case within the

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meaning of that term, as employed in section 8251 of the Code of Civil Procedure, so as to entitle a party to tax as costs the same sums as upon an appeal.

Although it is the proper practice on such a motion to settle a case, yet the whole office of the case is to enable the court, by an inspection of the same, to ascertain whether the alleged newly discovered evidence, as disclosed by the affidavits, is cumulative. The motion is made upon the affidavits; no recourse being had to the case, except for the purpose indicated, whilst a motion for a new trial *on a case*, by the very terms employed, imports a motion based wholly upon the record of the proceedings on the trial, and for some error in which a new trial is sought.

In case of an appeal from a judgment and order denying a motion for a new trial, the successful party would be entitled to the costs in controversy, viz.: sixty dollars costs of motion, and ten dollars for making amendments to case, but not otherwise. (*Hossley* agt. *Colerick*, ante, 169.)

136. Section 3258—In an action of foreclosure, although difficult and extraordinary, the additional allowance is limited to two and one-half per cent. (*See O'Neill* agt. *Gray*, 39 Hun, 566.)

37. Section 3258, sub 1—Increased costs in an action against a public officer—when not allowed in an action upon an indemnity bond. (*See Conner* agt. *Keece*, 88 Hun, 124.)

189. Section 3315—Fees—right of a juror to an extra compensation when a trial occupies more than thirty days. (*See De Wolf* agt. *Day*, 89 Hun, 484.)

189. Section 3347, sub. 11—Construction of an agreement for arbitration—right to recover the amount named in a bond as a penalty—2

R. S. (*Edm. ed.*), 892, 898, secs. 5, 11—Code of Civil Procedure, sec. 1915. (*See Republic of Mexico* agt. *Ockershausen*, 87 Hun, 533.)

CODE OF CRIMINAL PROCEDURE.

1. Sections 56, 62, 185, 147—Court of special sessions—its jurisdiction is limited to offenses committed within the county. (*See People* agt. *Bates*, 88 Hun, 180.)

2. Section 278—Not more than one separate and distinct crime can be charged in an indictment. (*See People* agt. *Upton*, 88 Hun, 107.)

3. Section 308—This section has not changed the law in respect to compensation of counsel assigned by the court to defend a prisoner. (*The People ex rel. Brown* agt. *Board of Supervisors*, ante, 1.)

4. Section 323, sub 3, sec. 331—Not more than one separate and distinct crime can be charged in an indictment—Code of Criminal Procedure, sec. 278—the objection should be taken by a demurrer, and is waived by a plea of not guilty—Code of Criminal Procedure, secs. 331, 464. (*See Upton* agt. *People*, 88 Hun, 107.)

5. Section 376—Challenge to a jury for bias—to what subject the bias must relate—peremptory challenge—right of comment by the court—(*See People* agt. *Carpenter*, 88 Hun, 490.)

6. Section 376—Juror—when not disqualified by reason of having formed an opinion. (*See People* agt. *Otto*, 88 Hun, 97.)

7. Section 392—Where a physician is selected by the public prosecutor, and sent by him to a prisoner after a crime has been committed, and she accepts his services in a professional character, disclosures made

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by her to him are privileged communications, and this rule applies to all actions civil or criminal.

The opinion of such physician as to whether an abortion has been committed, founded partly on such statements, is also inadmissible.

Although the prisoner was a party to the crime (abortion) and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gesta*, were not admissible. (*People* agt. *Murphy*, *ante*, 469.)

8. Section 895—Evidence—a defendant cannot be convicted upon his confession alone—right of a minor to rescind a contract. (*See People* agt. *Kelly*, 37 *Hun*, 160.)

9. Section 395—Confession of a person accused of crime—what is included in the term as used in this section—when the prisoner's examination before the coroner is admissible—what evidence in addition to a confession is necessary to authorize a conviction. (*See People* agt. *Mondon*, 38 *Hun*, 188.)

10. Section 464—Not more than one separate and distinct crime can be charged in an indictment—Code of Criminal Procedure, sec. 278—the objection should be taken by a demurrer—Code of Criminal Procedure, sec. 323, sub. 3—and is waived by a plea of not guilty—Code of Criminal Procedure, sec. 331. (*See People* agt. *Upton*, 38 *Hun*, 107.)

11. Section 527—Errors upon a criminal trial can be made available in this court only by exception duly taken on the trial. This rule is not changed by the provision of the Code of Criminal Procedure (sec. 527), authorizing the supreme court on appeal in a criminal action to grant a new trial where the judgment is against evidence or law, al-

though no exceptions were taken on the trial. (*The People* agt. *Gut-diet*, 100 *N. Y.*, 503.)

12. Section 527—The power given by section 527 of the Code of Criminal Procedure of ordering a "new trial, if satisfied that the verdict * * * was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below," was intended to be exercised by the supreme court alone, and does not apply to this court. (*People* agt. *Donovan*, *ante*, 355.)

13. Sections 620-633—Where upon a criminal trial the deposition of a witness taken in pursuance of said Code (secs. 620-633) on the application of the prisoner was offered in evidence on behalf of the people, and received without objection or exception on the part of the defendant, *held*, that no question as to its admissibility could be considered here. (*Id.*)

14. Section 717—Court of special sessions—restrictions upon the power of, to impose a sentence upon one under conviction before it—*habeas corpus*—proper remedy for one imprisoned under a void judgment. (*See People* *ex rel.* *Stokes* agt. *Risoley*, 38 *Hun*, 280.)

15. Section 751—Criminal procedure—when objections not raised in the lower court cannot be taken on appeal. (*See People* *ex rel.* *Baker* agt. *Beatty*, 39 *Hun*, 476.)

CODE OF PROCEDURE.

1. Section 227—Attachment—void because of a failure to serve the summons within thirty days, as required by section 227 of the Code of Procedure. (*See Cassitt* agt. *Winchell*, 39 *Hun*, 489.)

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CODE OF REMEDIAL JUSTICE.

1. Section 442—Where an affidavit for an attachment was made April 21, 1877, and the warrant issued May 2d, and final judgment entered August 21st, the Code of Remedial Justice being in effect from May 1 to May 22, 1877, and the affidavit did not conform to the Code of Remedial Justice when presented to the judge, but was in strict conformity to the Code of Procedure, which was in force when the affidavit was drawn, and also when the judgment was entered:

Held that the effect of the statutes was that proceedings taken during said twenty-two days were valid if taken under either Code, so far as concerned an action previous to September 1, 1877.

It is sufficient to confer jurisdiction to grant an order of publication of summons, where the affidavit shows that efforts were made to serve it, and to ascertain defendant's place of residence, and that his residence and whereabouts were unknown.

Where the venue was placed in Sullivan county in the summons, and it was stated in the notice that the summons was issued by the county judge of Sullivan county, and was filed with the complaint, it was sufficient notice that the complaint was filed as required by Code of Remedial Justice, section 442, where it was questioned in a collateral proceeding, although it might be irregular in a direct proceeding. (*Denman agt. McGuire, ante, 406.*)

COLLATERAL SECURITY.

1. The transfer of accounts against third parties, as security for an indebtedness of the assignor to the assignee, does not extend the time of payment of the original debt, unless it is so agreed. (*Wheeler agt. Jones, ante, 478.*)
2. To make the taking of collateral

security extend the time of payment of the indebtedness secured, there must be either a positive agreement to that effect or the circumstances must show that such was in fact the intention of the parties. (*Id.*)

3. Mere neglect on the part of a creditor to collect securities held by him as collateral security to a debt, will not release the debtor. (*Id.*)

COMPLAINT.

1. In an action to recover damages for the wrongful conversion of certain bonds, a complaint alleging "that at a certain time this plaintiff, at request of defendant, delivered said bonds to defendant, as his agent, for the purpose and upon the agreement that the defendant would sell the same at a price satisfactory to the plaintiff, the proceeds of sale, when due, to be immediately delivered to this plaintiff, and, if not sold, returned upon demand to this plaintiff; that, prior to the commencement of this action, plaintiff duly demanded from the defendant the return of said bonds, but the defendant has refused to return said bonds, or any of them, to plaintiff, but has wrongfully converted the same to his own use to the damage of the plaintiff, &c.:"

Held, that the complaint contains every fact necessary to give to the plaintiff his right to relief. There is a sufficient allegation, that there has been a proper demand, and a refusal on the part of the defendant:

Held, further, that a wrongful conversion by the defendant of the property is sufficiently alleged:

Held, also, that the allegation that the bonds were duly demanded from the defendant is, in effect, a statement of the fact that the plaintiff, in accordance with the contract, duly demanded the return of the bonds. And this allegation also negatives any idea that there had been a sale of the bonds by the de-

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- defendant. (*Bradley agt. Fanshawe, ante, 118.*)
2. In an action against certain corporations, where it was averred that the plaintiff is informed and believes that the said last named defendants respectively, except the said defendant the New York Newspaper Union were and are foreign corporations, companies or associations, &c., but did not state under the laws of what state, country or government the said defendant was created. On demurrer:
Held, that the complaint was bad as not stating the facts required to be stated by section 1775 of the Code of Civil Procedure, and that as it appeared by the complaint that certain defendants were foreign corporations the objection could be taken by demurrer. (*Clegg agt. Cramer et al., ante, 128.*)
3. In an action to dissolve a corporation brought under the provisions of section 1785 of the Code of Civil Procedure, is not material whether the defendant is a manufacturing, &c., corporation or not, as the section refers to all corporations created by or under the laws of the state. (*People, &c., of New York agt. Excelsior Gas-light Co., ante, 137.*)
4. Where the dissolution is claimed by reason of the insolvency of the corporation, and the complaint, in addition to an allegation that the defendant has been unable to meet its obligations, and that it has failed to pay a certain judgment, which the answer alleges has been paid, it alleges that the said defendant has not a dollar in its treasury, and is insolvent and has been for at least a year past, the answer not denying this allegation, but alleging payment of the judgment and averring that the said company has no liability to creditors by way of judgments unsatisfied:
Held, that, on the pleadings, the plaintiff is entitled to judgment. (*Id.*)
5. Insolvency means a general inability to answer in the course of business the liability existing and capable of being enforced. A corporation, like an individual, is insolvent when it is not able to pay its debts. It may be insolvent, although no judgments have been recovered against it. (*Id.*)
6. In action against an indorser of a promissory note where the indorsement was subsequent to the inception of the note, the complaint must allege a consideration for the indorsement. (*Myers et al. agt. Crim et al., ante, 194.*)
7. This is necessary, as a consideration must be proved, the indorsement being subsequent to the inception of the note and not alleged to have been done in pursuance of any arrangement made at the time the note was made. (*Id.*)

COMMISSION.

1. An open commission cannot be allowed where the testimony is to be taken elsewhere than in the United States or in Canada. (*Purdy et al., agt. Webster, ante, 263.*)
2. In an application for an open commission, where the witnesses that the defendants proposed to examine did not reside in Florida, nor did it appear that they were at the time of such application in that state, but it did appear that they resided in the island of Cuba:
Held, that such an order should not be granted unless it was made to appear that such a commission was absolutely necessary for the protection of the applicant's rights. (*Id.*)

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CONSTITUTIONAL LAW.

1. The act of 1885, chapter 486, establishing a life insurance fund for the police department of the city of New York is constitutional. (*The People ex rel. Murray agt. McClave, ante* 8.)

CONTEMPT.

1. Where, during a criminal trial, a juryman went during a recess to the scene of the affray, without the permission of the court, for the purpose of acquainting himself with the locality and its surroundings, he is not guilty of a criminal contempt, for which he would be summarily punished by the court. (*People ex rel. Munsell agt. Oyer and Terminer, ante*, 418.)
2. A civil contempt may go beyond the statutory enumeration, and draw in what was usual or permissible at common law, but criminal contempt is precisely defined and barred in by the statute. (*Id.*)
3. Where proceedings are instituted by a party to a civil action to have another party thereto adjudged guilty of a contempt for refusing to answer questions propounded to him on his examination under an order made for that purpose, pursuant to section 878 of the Code of Civil Procedure, the misconduct can only be punished as prescribed in title 3 of chapter 17 of the said Code. The provisions of the said Code, prescribing the punishments to be inflicted upon one adjudged guilty of a criminal contempt, do not apply to such a proceeding. (*King agt. Flynn, 87 Hun, 329.*)
4. The punishment to be imposed upon a person adjudged in contempt, in a proceeding taken by a party to a civil action, is by a fine sufficient in amount to indemnify the aggrieved party for the "loss or injury" occasioned by the misconduct complained of, together with the costs and expenses incurred by him in the vindication of his right. (*Id.*)
5. *Quare*, as to whether the fine of \$250, the imposition of which is authorized by section 2284, should not when collected be paid into the county treasury. (*Id.*)
6. That, as in this case the only loss or injury sustained by the plaintiff was a fruitless attendance before the officer appointed to take the examination, his indemnity should not be greater than the amount fixed by law for similar or analogous services, and should not in this case exceed ten dollars. (*Id.*)
7. That the costs and expenses incurred by the plaintiff in vindicating his rights should be included in the allowance, but should be limited to motion fees and disbursements. (*Id.*)
8. That counsel fees could not be included therein. (*Id.*)
9. To warrant an indictment and punishment under the Revised Statutes (2 R. S., 692, sec. 14), as for a criminal contempt, for a willful disobedience of a "process or order lawfully issued or made" by a court of record (2 R. S., 278, sec. 10), it must appear that the process or order disobeyed was lawfully issued by some court of record as such; it is not sufficient to show that it was issued by a public official without any direct action or determination by the court. (*Sherwin agt. People, 100 N. Y., 851.*)
10. A subpoena issued by a district attorney in a criminal action is not such a process or order, and a willful disobedience thereof is not an indictable offense under said statutes. (*Id.*)

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CONTRACT.

1. If a contract is so far personal that the representatives of one of the parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not so responsible for like failure, in the absence of evidence of intention to bind the representative. (*Babcock agt. Goodrich, ante, 53.*)

2. H., a merchant tailor, employed the plaintiff to labor in his shop at cutting garments, for a year, at an agreed price per week. While the parties were engaged in the performance of the contract H. died, and his administrator refused to continue plaintiff's employment.

Held, that the contract was purely personal, and was liable to be terminated by the death of either party to it, and the death of H. justified his executor in ending the contract and refusing further to go on in its performance. (*Id.*)

3. The plaintiff was hired by the defendant's testator to do ordinary farm work for one year at \$200 per year. Near the middle of the year the employer died. The plaintiff continued to work on the farm, as provided in the contract, until the end of the year. In an action against the executrix to recover the \$200 due under the contract:

Held, that the death of the testator terminated the contract, and the recovery should be limited to the value of the services up to the death of the testator. (*Lacy agt. Getman, ante, 250.*)

4. Under a contract for the supply of a quantity of machinery, the purchaser is under no obligation to make any payment until the contract has been fully performed and the whole of the machinery delivered, and until then the purchaser does not become a debtor under the contract. (*Throop Grain Cleaner Co. agt. Smith, ante, 290.*)

CORPORATION.

1. In an action to dissolve a corporation brought under the provisions of section 1785 of the Code of Civil Procedure, is not material whether the defendant is a manufacturing, &c., corporation or not, as the section refers to all corporations created by or under the laws of the state. (*People, &c., of New York agt. Excelsior Gas-light Co., ante, 187.*)

2. The general rule seems to be, that in an action brought by a stockholder to restrain alleged wrongful acts of the corporation, it must be averred and shown that the corporation has on proper application for that purpose refused to bring any suit, or to take any proper steps for the redress of those grievances. (*Anderton, Jr., agt. Aronson, ante, 216.*)

3. In this case it is not claimed that any demand has been made by the plaintiff upon the board of directors to bring the action, but it is alleged in the complaint that "inasmuch as the defendant A. controls a majority of the board of directors, who are friendly to him, and aid and assist him in his illegal acts, and without whose consent or direction this action cannot be brought, this suit has been commenced by the plaintiff, and the said corporation is made a party defendant."

Held, that under the peculiar circumstances of this case the plaintiff has a standing in court and a right to maintain this action. (*Id.*)

4. The mere presence of a director or president of a corporation at a meeting of the board of directors vitiates the action of such board in respect to all matters which relate to his individual interest, unless such action be subsequently ratified by the stockholders. (*Id.*)

See COMPLAINT.

Lacy agt. Cramer et al., ante, 128.

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COSTS.

1. In an action for an assault and battery committed by two defendants, on a motion by defendant for leave to serve supplemental answer setting up the recovery and satisfaction of a judgment against another party for the same cause of action.

Held, that the provisions of section 3231 of the Code of Civil Procedure (for the recovery of but one bill of costs when several actions are brought for the same cause) applies to this class of actions; and plaintiff is not entitled to costs, but only to taxable disbursements which have not been incurred and were not included in the other case. (*Roberts* agt. *Worner*, ante, 524.)

2. Upon an application to a clerk for the taxation of costs the proofs presented by the applicant, although complying in form with the requirements of the Code of Civil Procedure, are not conclusive but may be opposed by proof on the part of the adverse party or person interested in reducing the amount of the costs. (*Crosley* agt. *Cobb*, 87 *Hun*, 271.)
3. Although the statute may not require the affidavit of the applicant to be served upon the adverse party with the notice of taxation, yet it is the general, if not the universal, practice to so serve it. (*Id.*)
4. Upon the taxation the clerk should decide the questions of fact raised by conflicting affidavits, and disallow all charges for witnesses who were unnecessarily subpoenaed or unnecessarily requested to attend, or whose attendance was procured with the view of increasing the costs. (*Id.*)
5. Upon a motion to review such taxation the special term should, when a question of law is presented, allow or disallow the item presented instead of ordering a new taxation before the clerk. Where the objec-

tion presents a question of fact the special term may determine it and allow or disallow the item, or it may direct a new taxation before the clerk, specifying the grounds or the proofs upon which the item may be allowed or disallowed. (*Id.*)

6. Upon a new taxation before the clerk both parties may present their evidence without being confined to the evidence first presented and thus retry the question of fact. (*Id.*)
7. The plaintiff brought this action to recover certain articles of personal property, or their value, which the defendant, a sheriff, had levied upon under an execution against one Palmer. The complaint contained but a single count. The referee decided that the plaintiff was entitled to recover certain of the articles, of the value of \$293, which had been transferred to him by the debtor's wife; that the other articles transferred to him by the debtor, of the value of \$398, were the property of the debtor, and that the defendant had acquired a special property therein to the amount of the execution (\$108), the plaintiff being the general owner thereof subject to defendant's lien thereon. *Held*, that the case was not one in which each party was entitled, under section 3234 of the Code of Civil Procedure, to costs against the adverse party, and that the plaintiff only was entitled to recover them. (*Kilburn* agt. *Loose*, 87 *Hun*, 287.)
8. The plaintiff, while the sole acting executrix of one Roseboom, brought this action upon a promissory note made by the defendant to the order of the deceased. After the commencement of the action the defendant, who was also appointed an executor in the will, qualified and set up that fact as a defense thereby procuring a dismissal of the complaint. A judgment dismissing the complaint and for costs was entered in the defendant's favor, and there-

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after he moved to have the plaintiff charged personally with the payment of the costs. *Held*, that the motion was properly denied. (*Dean* agt. *Roseboom*, 37 *Hun*, 310.)

9. Duty of the court to determine an equitable action, where a temporary injunction has been granted and an issue joined therein, although the matter in dispute has been decided by the lapse of time—when the court should determine the case simply for the purpose of settling the rights of the parties to costs. (*See Kelley* agt. *McMahon*, 37 *Hun*, 212.)

10. Sureties upon an undertaking for an attachment—they are liable for costs awarded to the defendant, although the attachment be not formally vacated—Code of Civil Procedure, section 640. (*See Lee* agt. *Homer*, 37 *Hun*, 634.)

11. Execution against the person—when it may be issued to collect costs—Code of Civil Procedure, section 550, subdivision 4. (*See Smith* agt. *Duffy*, 37 *Hun*, 506.)

12. Trial—effect of a reference in the charge, to the effect of a verdict on the costs of the action. (*See Tucker* agt. *Ely*, 37 *Hun*, 565.)

13. A motion made by a referee appointed in this action for an order adjusting his costs having been granted, an appeal was taken therefrom by certain of the policyholders. Subsequently the policyholders moved to stay all proceedings on the part of the respondent, under section 779 of the Code of Civil Procedure, on the ground that the referee had not paid certain costs awarded against him by an order made October 9, 1882. No demand for the payment of the costs had been made upon the referee until September 29, 1885, after the appeal had been taken. No reference was made to the non-payment of these costs in the papers used, or

at the hearing had, at the special term. *Held*, that the appellant must be deemed to have waived the stay given by the said section, and that his motion should be denied. (*Attorney-General* agt. *Continental Life Ins. Co.*, 38 *Hun*, 522.)

14. In this action, brought to partition certain real estate in the city of New York, an interlocutory judgment, adjudging the property to belong to the heirs-at-law of one Jacob Weeks, was modified at the general term as to the persons entitled to the property, without determining the names or shares of the real owners, and a referee was appointed to ascertain and report who were the persons entitled to the property and their rights and interests therein. While the reference was pending, the attorneys for certain of the parties moved for and obtained an order requiring a receiver of the rents and profits, who had been appointed in the action, to pay out of the funds in his hands disbursements made by them amounting to \$1,442.97. *Held*, that the order should be reversed; that the right to recover costs was to be determined by the judgment finally to be entered in the action, and that until such a judgment had been recovered no order for the payment of costs or disbursements should be made. (*Weeks* agt. *Cornwell*, 38 *Hun*, 577.)

15. Where an order of a surrogate granting leave to issue an execution upon a judgment, after the death of the judgment-debtor, is affirmed, with costs, by a general term, the successful party is entitled to enter and docket a judgment of affirmance establishing the surrogate's decree and awarding costs as in an action for similar services, and to issue an execution for the collection of the amount of the costs included therein. (*Wadley* agt. *Davis*, 38 *Hun*, 186.)

16. The plaintiff, having been de-

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- feated in an action brought by him in a justice's court to recover damages for the killing of his dog, appealed to the county court and demanded a new trial, and upon such new trial he recovered a verdict of three dollars. *Held*, that he was entitled to recover costs. (*Vanderwerker* agt. *Brown*, 88 Hun, 234.)
17. Section 8070 of the Code of Civil Procedure, regulating the right to recover costs on appeals from judgments of justices' courts, does not apply to cases such as this where a party who has been wholly defeated in a justice's court succeeds in the county court. (*Id.*)
18. Where, upon a taxation of costs upon notice, an item of term fees is struck out by the clerk, and a judgment is thereafter entered by the moving party for his damages and the costs as so taxed, he cannot thereafter move to reopen the taxation and have the term fees allowed to him. (*Burrows* agt. *Butler*, 88 Hun, 121.)
19. An action, brought by a sheriff against a deputy and the sureties upon a bond given by such deputy to insure the faithful performance of the duties of his office, to recover for a breach of the conditions thereof, is not an action in which the defendants, if successful, are entitled to increased costs under subdivision 1 of section 8258 of the Code of Civil Procedure. (*Conner* agt. *Kaese*, 88 Hun, 124.)
20. Liability of a party, discontinuing an action, for the costs and expenses incurred—right of a person, rendering services under the employment of a referee, to maintain an action against the plaintiff discontinuing the action for the value of the services so rendered. (*See Messerle* agt. *Furman*, 88 Hun, 855.)
21. Right to issue a precept to collect the costs of a motion—Code of Civil Procedure, section 779—when the order is served by mail the party has twenty days within which to pay them—costs of a motion cannot be set off against other motion costs, after the latter have been assigned by the party. (*See Wellman* agt. *Frost*, 88 Hun, 889.)
22. Motion for a new trial on exceptions—within what time it must be made—costs allowed on its denial. (*See Forstman* agt. *Schulting*, 88 Hun, 482.)
23. Costs may be allowed to a special guardian unsuccessfully contesting the probate of a will, but limited by, and only as specified in, the Code of Civil Procedure (sec. 2578-2581). (*In re Budlong*, 100 N. Y., 208.)
24. Where mother of infant is cited in proceedings for appointment of some other person than her as guardian is not party to proceedings in such sense as to be subjected to liability for costs. (*See In re Valentine* [mem.], 100 N. Y., 607.)
- See SUPERVISORS.*
People ex rel. Supervisors of Ulster County agt. *City of Kingston*, ante, 452.
25. Where in an action against two or more defendants the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs as of course. (*Krafft* agt. *Wilson*, ante, 18.)
26. The provisions of section 8229 of the Code of Civil Procedure, that costs may be awarded in such case to a successful defendant in the discretion of the court, applies only where such successful defendant is not united in interest with those unsuccessful, and when he interposes a separate defense by a separate answer. The fact of not being united in interest standing alone is not sufficient; both cir-

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sumstances must exist before costs can be awarded. (*Id.*)

27. In an action brought by an assignee to set aside a chattel mortgage given by a judgment debtor to defendants as security for \$26,000 of acceptances made by defendants for the mortgagors, said chattel mortgage covering a large quantity of lumber, machinery, &c., the assignee seeking to compel defendants to account to him for the property taken by them under said mortgage, a reference being had, the costs of the action are in the discretion of the referee, and after the exercise of such discretion it is not within the province or power of the special term to overhaul and overturn his conclusions. (*Couch* agt. *Millard et al.*, *ante*, 22.)

28. His decision as to costs cannot be disturbed, except by an appellate court having power to review the case upon its merits. (*Id.*)

29. An attorney has a lien on motion costs ordered in favor of his client, and as equitable assignee thereof, which lien attaches the instant the costs are due. (*Place* agt. *Hayward*, *ante*, 59.)

30. Where an order was made at special term, on motion of counsel for defendant, "that an allowance of \$500 is granted to the defendant against the plaintiff, as executor, together with the costs of this action, costs and allowance not to be paid by plaintiff personally;" and on defendant's motion this order was reconsidered and reaffirmed, and this decision was sustained by the general term, the defendant appealing to the court of appeals, who dismissed the defendant's appeal, with \$116.02 costs to the plaintiff.

Held that the costs allowed to this plaintiff are motion costs, and cannot be offset against any costs in the action due by the plaintiff to the defendant. That the plaintiff

cannot pay the defendant out of money which legally belongs to the plaintiff's attorney, and that these costs are collectible from the defendant under section 779 of the Code of Civil Procedure. (*Id.*)

31. The plaintiff sued for \$333.33, and the court found that the plaintiff was entitled to recover this sum, but the recovery was reduced by independent counter-claims to \$5.20:

Held, that as the sum total of the accounts of both parties, proved to the satisfaction of the court, exceeded \$400, a justice's court would not have had jurisdiction of the action, and for this reason the plaintiff was entitled to full costs. (*Labache* agt. *Kirkpatrick et al.*, *ante*, 61.)

32. When a party is allowed to amend his pleading upon payment of certain costs designated in the order as "costs," his adversary is not deprived of his right to tax a full bill of costs if successful. (*Cohn et al.* agt. *Husson*, *ante*, 180.)

33. The amount so paid was not intended to deprive either party of any costs which had accrued at the time of the entry of judgment. (*Id.*)

34. A motion for a new trial upon the grounds of surprise and newly discovered evidence, is not a motion on a case within the meaning of that term, as employed in section 3251 of the Code of Civil Procedure, so as to entitle a party to tax as costs the same sums as upon an appeal. (*Hosley* agt. *Colerick*, *ante*, 169.)

35. Although it is the proper practice on such a motion to settle a case, yet the whole office of the case is to enable the court, by an inspection of the same, to ascertain whether the alleged newly discovered evidence, as disclosed by the affidavits, is cumulative. The motion is made upon the affidavits, no recourse being had to the case, except for the purpose indicated,

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- whilst a motion for a new trial *on a case*, by the very terms employed, imports a motion based wholly upon the record of the proceedings on the trial, and for some error in which a new trial is sought. (*Id.*)
36. In case of an appeal from a judgment and order denying a motion for a new trial, the successful party should be entitled to the costs in controversy, viz., sixty dollars costs of motion, and ten dollars for making amendments to case, but not otherwise. (*Id.*)
37. Where upon the trial of an action in which interpleader was allowed under the Code, the plaintiff established title to part of the fund in court and the defendant to the balance, and on the pleadings each party denied all:
Held, that neither was entitled to costs "as of course," but that the award of costs in such cases rested in the discretion of the court. (*Oronin agt. Oronin, ante, 184.*)
38. Where, at the time of the trial, the witness' permanent residence was in the city of Rochester, but, when subpoenaed, he was temporarily in the city of New York on business, and refused to attend unless he was paid the statutory travel fees, and the plaintiff paid him, he making an affidavit that he was obliged to travel from the city of New York to the city of Rochester for the purpose of attending the trial, and, after it was over, to return to New York:
Held, that the travel fees were properly allowed, and the plaintiff had a right to tax them. (*Pfandler Bauu Bunting Apparatus Co. agt. Pfandler, ante, 253.*)
39. The rule is to allow travel fees when paid to a witness in such cases, unless it appears that the party was in fault and guilty of negligence in omitting to serve the subpoena before the witness left his home, and, in view of the facts as disclosed, it was incumbent on the party resisting the allowance to show the fault of the party paying the travel fee. (*Id.*)
40. Where the plaintiff procured from the reporter a copy of the evidence, whose fees were allowed as an item of disbursement in the bill of costs as taxed, and the affidavit as to the disbursements, which was made by the plaintiff's attorney, states that the items of disbursements set forth in the bill were "actually made and incurred," the trial judge made a certificate that, on the trial, he directed the stenographer's minutes to be furnished the court, and that the reporter's fees be taxed as a disbursement:
Held, that as it did not appear that the court used the copy procured by the plaintiff, or that it was obtained by him for that purpose, the item should have been disallowed. (*Id.*)
41. In an action for damages for an alleged trespass upon lands, where the plaintiffs were M. B., the widow of P. B., deceased, and four infant children, and heirs of deceased, who sued by guardian, the complaint alleged that the widow had a dower interest in the premises in question, and that the infants were owners of the premises as tenants in common, subject to the dower interest of the widow. It also alleged that all the plaintiffs were in possession of the premises at the time of the alleged trespasses. The answer contained a general denial of the allegations of the complaint, except as admitted, and alleges, for a further defense, that one of defendants was the lessee of certain premises in the same town as the premises claimed by the plaintiffs, and that the house mentioned in the complaint stood on the premises of the defendant, and that she removed it from her own premises, as she had a right to do:
Held, that the allegations thus referred to directly put in issue the

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title to the *locus in quo*, and entitled the plaintiffs to costs. (*Boyle* agt. *Lawton*, ante, 444.)

42. Not only does the complaint allege title in the infant plaintiffs, subject to the dower interest of the widow; but the answer takes issue with that allegation, *first*, by denying it, and, *secondly*, by alleging title in the defendant as lessee of the soil on which the house stood, the removal of which was one of the trespasses alleged. (*Id.*)

COPYRIGHT.

1. The unauthorized reproduction and sale of a copy of a cut from a copyrighted book or weekly paper is not an infringement upon such copyright. (*Harper et al.* agt. *Shoppell*, ante, 282.)

COUNTY JUDGE.

1. Under section 780 of the Code of Civil Procedure, a county judge cannot make an order requiring a party to show cause why an application should not be granted which is returnable in less than eight days at a special term of the supreme court. (*People ex rel. Brown* agt. *Supervisors of Herkimer Co.*, ante, 242.)

COURTS.

1. Proceedings for the appointment of a committee of a lunatic—what allegation, as to his unsoundness of mind, will confer jurisdiction upon the county court—what constitutes unsoundness of mind—right of the county court to direct that the issue of fact be tried before a jury in that court. (*See Jackson* agt. *Jackson*, 87 *Hun*, 806.)
2. Duty of the court to determine an equitable action, where a temporary injunction has been granted and an

issue joined therein, although the matter in dispute has been decided by the lapse of time—when the court should determine the case simply for the purpose of settling the rights of the parties to costs. (*See Kelley* agt. *McMahon*, 37 *Hun*, 212.)

CRIMINAL PRACTICE.

1. Where the court assigns counsel to defend a prisoner, the counsel's claim for his services is not a legal charge against the county. (*The People ex rel. Brown* agt. *Board of Supervisors*, ante, 1.)
2. The defense of poor prisoners, upon assignment by the court, is one of the duties contemplated by the lawyer's oath of office, which he impliedly assumes in accepting the privilege of practicing law. (*Id.*)
3. A claim for services rendered by an assigned counsel, is not a charge against the county, because there is no statute directing or authorizing the court to assign counsel to defend prisoners, or providing any compensation or prescribing any mode of payment for such service. (*Id.*)
4. Section 808 of the Code of Criminal Procedure has not changed the law in this respect. (*Id.*)

CRIMINAL TRIAL.

See EVIDENCE.

People agt. *Murphy*, ante, 400.

DAMAGES.

1. In an action for the conversion of certain stocks taken by the defendant as collateral security and wrongfully sold and converted, the plaintiff is not entitled to recover the highest price of the stocks between the time of the conversion and the

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day of the trial (*Wright* agt. *Bank of the Metropolis*, ante, 204.)

2. The true rule of damages is their highest market value between the date of the conversion and a reasonable time. (*Id.*)

3. What is a reasonable time, is a question of fact for the jury. (*Id.*)

4. If the plaintiff, within a reasonable time after knowledge of the conversion of her stocks, had gone into the market and purchased an equivalent of the stock converted by the defendant, the price she would have paid would have been the true measure of damages. (*Id.*)

5. Where she voluntarily omits to buy back her stocks she, by her omission, takes upon herself the hazard of the fluctuations of the market, and she will not be permitted to visit upon defendant losses sustained by her omission. (*Id.*)

DEBT.

1. The transfer of accounts against third parties, as security for an indebtedness of the assignor to the assignee, does not extend the time of payment of the original debt, unless it is so agreed. (*Wheeler et al.* agt. *Jones*, ante, 478.)

2. To make the taking of collateral security extend the time of payment of the indebtedness secured, there must be either a positive agreement to that effect or the circumstances must show that such was in fact the intention of the parties. (*Id.*)

3. Mere neglect on the part of a creditor to collect securities held by him as collateral security to a debt will not release the debtor (*Id.*)

DEFAULT.

1. On a motion to open a default an affidavit of merits is not always sufficient. (*Cooper & Company* agt. *Findlay*, ante, 468.)

2. An absolute refusal to open an inquest may be justified. (*Id.*)

3. The party moving to open the default must state the grounds of his motion clearly, and under certain circumstances must meet the opposing affidavit. (*Id.*)

DEPOSITION BEFORE TRIAL.

1. Section 870 of the Code of Civil Procedure, authorizes an order for the examination of a person against whom an action is about to be brought, upon the application of the person who is about to bring such action, but before it has been actually commenced. (*Merchants' National Bank* agt. *Sheshan*, ante, 248.)

DISCONTINUANCE.

1. Where an action was begun in the court of common pleas by plaintiff as ancillary administrator of a lunatic, against the committee of such lunatic for an accounting, and before trial entered an *ex parte* order of discontinuance on payment of costs, which was vacated by the court, and a motion to discontinue also denied, on the ground that the plaintiff intended to commence an action in the supreme court, and would harass defendant:

Held, error; that, ordinarily, a suitor has a right to discontinue any action or proceeding commenced by him, and his reasons for so doing are of no concern to the court. (*In re Butler* agt. *Jarvis, Jr.*, ante, 509.)

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DISCOVERY.

1. A plaintiff cannot compel the discovery of correspondence in possession of the defendant, for the mere purpose of ascertaining in advance of the trial, whether such correspondence proves a modification of contract pleaded by the defendant and relied on by him as a defense to the action. (*James* agt. *Coze*, ante, 86.)

DISTRICT ATTORNEY.

1. Subpoena issued by district attorney is not a "process or order lawfully issued or made" by a court of record within the meaning of the statute defining and punishing criminal contempts. (*See Sherwin* agt. *People*, 100 N. Y., 851.)

DISTRICT COURTS.

1. The statutory interpleader, which is not in the nature of a suit in equity, but a remedy designed for use in common law courts, is a measure of relief to which suitors in a district court in the city of New York may resort. (*McElroy* agt. *Baer*, ante, 840.)
2. In the district courts, after the order of interpleader is made, a copy of the order and a copy of the complaint, drawn in conformity with the suggestion made in *Moak's Van Santvoord's Pleadings*, should be served upon the party brought in by the interpleader. The order should require him to appear and answer the complaint in the same time that a defendant is required to answer a summons, and should provide that the money in court shall be paid to the plaintiff in case of the failure to appear and answer of the party interpleaded. (*Id.*)
3. If the party appear and answer, the issue raised may be tried by the court, unless a jury be demanded at the time of the joinder of issue. Upon the entry of judgment the money must be paid to the prevailing party, unless an undertaking sufficient to stay proceedings be given, and costs should be awarded against the losing party. (*Id.*)

DIVORCE.

1. Where defendant, a resident of Canada, was married in 1844 to K. in this state, and lived with him until 1860, when she returned to Canada, and he went to Ohio and there obtained a divorce for desertion. A copy of the summons was sent to her by mail, and she was present at the taking of the deposition, but took no part in it. She afterwards married plaintiff, he knowing the fact of her former marriage, and he now asks a divorce on the ground that she had a husband living at the time of her marriage.

Held, that the divorce obtained in Ohio was without jurisdiction, and so null and void, as was also the marriage in this state, and the divorce should be granted (*DANFORTH, MILLER and FINCH, JJ., dissenting*). (*O'Dea* agt. *O'Dea*, ante, 271.)

DURESS.

1. The constraint and duress which has generally availed to impeach a contract, even as to transactions between husband and wife, has proceeded from actual violence or well grounded fear of personal injury. An assent obtained through such means is regarded as neither freely or voluntarily given, and as creating no valid obligation. (*Wallach* agt. *Hoexter*, ante, 825.)
2. Where the evidence showed that the defendant executed the mortgage through the persuasion of her husband, and for his benefit, and through threats on his part that if she did not do so, "he would come

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in and go out of the house as he pleased," and would "stay away from her at nights, and would withhold speech from her":

Held, that although these threats may have constituted the chief reasons why she executed the mortgage, yet as in the end she consented to do so, and did sign the papers voluntarily, there was no duress or illegal constraint exercised sufficient to impeach the mortgage in the hands of an innocent lender of money within the meaning of those terms, as understood in the courts. (*Id.*).

2. Upon the application of plaintiff, proceedings for the foreclosure of a mortgage were stayed, the plaintiff, although not a party to the mortgage, but liable on the bond, undertaking to pay the same by a certain day. Before the day named he procured a person to take an assignment of the mortgage. The defendants, the attorneys of the mortgagees, agreed to have the mortgage assigned, the plaintiff to pay the costs and expenses of the foreclosure suit. The defendants included in such costs and expenses an item of two and one-half per cent, amounting to \$187.50, in the nature of an allowance, which plaintiff disputed, and it was reduced by defendants to \$100, to which they claimed to be entitled, which latter sum was paid by the plaintiff, he, however, at the time protesting that it was illegally and wrongfully exacted. In an action brought to recover back the sum so paid:

Held, that it could not be recovered back, as paid under duress. (*Bliss* agt. *Wallis*, ante, 825.)

EJECTMENT.

1. As to who is the "actual occupant" of premises at the commencement of an action for ejectment, and so a proper defendant (2 *R. S.*, 804, sec. 4, *new Code of Civil*

Procedure, sec. 1503), is a question of fact for the jury; and when the title was in the wife they might properly find that she was the "actual occupant," even though her husband cultivated the soil, &c. (*RAPALLO* and *EARL*, JJ., dissent). (*Martin* agt. *Rector*, ante, 361.)

EVIDENCE.

1. In a replevin action brought by a vendor against an attaching officer of a fraudulent vendee, it is competent to show the fact that, shortly after the purchase, the vendee made a general assignment for the benefit of creditors. The recitals contained in it are not, however, competent evidence. (*Green* agt. *Rosa*, ante, 29.)
2. In such a case, the schedule and inventory made by the assignor, subsequent to the assignment and pursuant to the statute, are not admissible evidence. The inventory would not tend, as against the officer, to establish the assignor's liabilities. (*Id.*)
3. In an action for defamation of character when general damages only are claimed, it is not competent for the plaintiff to show, that, by reason of the defamatory matter, he was less esteemed by a particular person. (*Crosley* agt. *Cobb*, ante, 37.)
4. A question is not competent, on cross-examination, which does not relate to any matter inquired into in chief. (*Id.*)
5. When the trial judge is dissatisfied with the verdict, and sets it aside for reasons which he deems sufficient: on appeal, the burden is on the appellant to show that the order appealed from was erroneous. (*Id.*)
6. In an action brought by an executor to recover property of the deceased from persons claiming to own it by virtue of a gift from the

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- testator, declarations of the deceased, inconsistent with such claim, being self-serving, and not contemporaneous with the transaction, are inadmissible in favor of the executor. (*Miles et al. agt. Sackett, ante, 145.*)
7. Where the prisoner, the night before, fired one barrel of his revolver in his saloon, leaving three barrels loaded, and just before committing the crime said: "You or me going to die;" it is sufficient to justify the jury in finding that the murder was deliberate and premeditated; and whether the previous firing was intended to empty the revolver or to test it is a question of fact for the jury. (*People agt. Kiernan, ante, 264.*)
8. Where a physician is selected by the public prosecutor, and sent by him to a prisoner after a crime has been committed, and she accepts his services in a professional character, disclosures made by her to him are privileged communications, and this rule applies to all actions, civil or criminal. (*People agt. Murphy, ante, 469.*)
9. The opinion of such physician as to whether an abortion has been committed, founded partly on such statements, is also inadmissible. (*Id.*)
10. Although the prisoner was a party to the crime (abortion) and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gesta*, were not admissible. (*Id.*)
11. Ancient corporate deed—what is admissible as—presumptions as to its seal; as to the appointment and power of an officer of the corporation—form of acknowledgment by a corporation—what sufficient to authorize the recording of a deed—what instrument is sufficient to support a claim of title upon which to found an adverse possession—a general objection taken at the trial cannot be sustained on appeal by a specific one. (*Hoopes agt. Auburn Water-Works Co., 87 Hun, 568.*)
12. When oral testimony will not be admitted to contradict a written agreement. (*Id.*)
13. A defendant cannot be convicted upon his confession alone—Code of Criminal Procedure, sec. 395. (*People agt. Kelly, 87 Hun, 160.*)
14. A party reading part of the evidence given on a former trial cannot be compelled to read the whole of it. (*Purmonter agt. B., H. T. and W. R. R. Co., 87 Hun, 354.*)
15. Testimony as to the acts and complaints of one suffering from physical injuries—when it is admissible if the party himself cannot appear to testify. (*De Long agt. D. L. and W. R. R. Co., 87 Hun, 322.*)
16. Testimony as to the genuineness of the signature of a deceased person—when inadmissible under section 829 of the Code of Civil Procedure. (*Garvey agt. Owens, 87 Hun, 498.*)
17. Res adjudicata—the party seeking to avoid it must show that the issue in question was not decided—how the grounds of the former decision should be proved. (*See Dear agt. Read, 87 Hun, 394.*)
18. Rape—what evidence will justify a conviction of it—proof that complaint was made after the offense, by the prosecutrix—the name of the person accused by her cannot be given. (*See People agt. Clemens, 87 Hun, 580.*)
19. Transaction with a deceased person—what testimony does not relate thereto within the meaning of section 829 of the Code of Civil

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Procedure. (See *Saratoga County Bank agt. Leach*, 87 Hun, 886.)

20. When an agent cannot testify as to services rendered to a deceased principal or the non-payment therefor—Code Civil Procedure, sec. 829. (See *Lerche agt. Brasher*, 87 Hun, 885.)

21. When a party may testify to an extrinsic fact, which may tend to show that he has not had a certain personal transaction with a deceased person—Code of Civil Procedure, sec. 829. (See *McKenna agt. Bolger*, 87 Hun, 526.)

22. When a party cannot testify as to the address on a package sent by express to a deceased person—Code of Civil Procedure, sec. 829. (See *Stuart agt. Patterson*, 87 Hun, 118.)

23. When notice to a corporation may be inferred from a notice given to its trustees. (See *Winne agt. Ulster Co. Sav. Institution*, 87 Hun, 849.)

24. What admissible to establish fraudulent representations under which a consent of a woman to marry was obtained. (See *Moot agt. Moot*, 87 Hun, 288.)

25. Larceny—procuring goods by false representations—evidence as to the intent with which the act was committed—when the schedules of an assignee are inadmissible as against the assignor. (See *People agt. Moore*, 87 Hun, 84.)

26. Taxation and retaxation of costs—admissibility of evidence upon the hearing—mode of reviewing the taxation at special term. (See *Orosley agt. Cobb*, 87 Hun, 271.)

EXAMINATION OF PARTIES BEFORE TRIAL.

1. The recorder of the city of Watertown has power, and may make an

order, for the examination of a defendant under sections 872 and 873 of the Code of Civil Procedure. (*Babcock agt. Balston*, ante, 260.)

2. Where the complaint is on a promissory note and no answer has been put in, and it is sought to examine the defendant as to the consideration of the note, the plaintiff should show a reasonable expectation on his part that the consideration is to be denied, to entitle him to the order. (*Kane agt. Clarke*, ante, 270.)

3. Under section 870 of the Code of Civil Procedure an order may be granted to the plaintiff for the purpose of examining a person against whom he proposes to bring an action, but the granting of such order is entirely in the discretion of the court. (*Merchants' Nat. Bank of New York agt. Sheehan*, ante, 450.)

EXCEPTION.

1. An appeal from a judgment entered on a verdict must be determined solely upon exceptions taken on the trial. (*Third Ave. R. R. Co. agt. Ebling*, 100 N. Y., 98.)

2. An exception can be taken only to a ruling by the trial court upon a question of law. (*Id.*)

3. Where there is no exception to a ruling of the court as to the sufficiency of the evidence to establish a fact in issue and the defeated party desires to move for a new trial, he must do so in the first instance before the trial court or at special term. (*Code of Civ. Pro.*, secs. 999, 1002.) (*Id.*)

4. Not having done this, no question affecting the merits or the sufficiency of the evidence to support the verdict may be raised at general term. (*Id.*)

5. An exception to the admission of

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evidence may only be taken when it is received against the parties' objection. (*Id.*)

6. Errors upon a criminal trial can be made available in this court only by exception duly taken on the trial. This rule is not changed by the provision of the Code of Criminal Procedure (*sec.* 527), authorizing the supreme court on appeal in a criminal action to grant a new trial where the judgment is against evidence or law, although no exceptions were taken on the trial. (*People agt. Guidici*, 100 N. Y., 503.)

7. A general exception to a portion of a charge is of no avail, unless all of the propositions laid down therein are erroneous. (*Id.*)

EXCISE LAW.

1. The fact that a building is used during some part of the time as a place of public amusement, affords of itself no valid ground for the refusal by the board of excise of an excise license. (*People ex rel. Gillan agt. Haughton*, *ante*, 135.)

EXECUTORS AND ADMINISTRATORS.

1. In construing a will whose provisions are fully set forth *infra*;

Held, that the testator's widow was given a life estate simply, with power to receive and enjoy only the interest and income of the principal, which at her death was to go to the testator's children.

Held, also, that under the circumstances here disclosed, the conduct of the executor in turning over the entire estate to the testator's widow for her own use and enjoyment, without exacting from her any security for the protection of the interests of the remainderman, was such wasteful and improvident management of the estate to demonstrate the unfitness of

such executors for the due administration of their trust, and to justify the revocation of their letters.

It seems, that although the general practice is to defer the determination of an application for the revocation of testamentary letters pending accounting proceedings, until such proceedings have terminated, yet under certain circumstances executors may be removed during the pendency of such proceedings. (*Matter of Fernbacher, deceased*, *ante*, 81.)

2. Where an executor has finally accounted before the surrogate, the heirs and legatees of the deceased (the plaintiff's assignor bring one of them) having executed a general release to the executor, and thereupon a decree having been entered judicially settling his accounts and discharging him as such executor:

Held, that the executor, having accounted before the surrogate, could not, until his accounts so rendered were impeached, be required to account further:

Held, further, that the burden of impeaching the accounts rendered, and of showing that the defendant, as executor, &c., then had in his hands money or property of the estate not accounted for is on the plaintiff, and until that burden is met and an interlocutory judgment is rendered in the plaintiff's favor on that issue, the executor cannot properly be required to account for any purpose. The impeaching facts are to be proved by the same species of evidence as any other fact. (*Moffat agt. Moffat*, *ante*, 156.)

3. The defendant can be called as a witness by plaintiff and compelled to testify as to whether he had any property in his hands as executor, &c., not embraced in his accounts rendered, and to specify the property; but he cannot be compelled to render an account for the purpose of furnishing evidence in the plaintiff's behalf, upon the primary

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- issue whether he is liable to account. (*Id.*)
4. Whether, upon interlocutory judgment being rendered against the executor upon that issue, he can be compelled to account generally, or only in respect to matters not embraced in his accounts before the surrogate, *quære* (*Id.*)
 5. The surrogate's court has jurisdiction to determine whether the demand of a creditor, claimed by an executor or administrator to be barred by section 1822 of the Code of Civil Procedure, has, in fact, been "disputed or rejected" within the meaning of that section. (*Estate of Lange, ante, 162.*)
 6. The mere appearance of an interest is ordinarily sufficient to justify an order for an accounting by an administrator (1 *Bradf.*, 24). The surrogate has no jurisdiction to determine the validity of a release, and where its invalidity is sworn to will direct an accounting. An accounting has been ordered at the instance of a residuary legatee who had given a release to the executor (25 *N. Y.*, 142). (*Estate of Duffy, deceased, ante, 240.*)
 7. Where the defendant, who was a foreign administrator, was sued upon the guaranty of a bond, made by his intestate, and the complaint averred assets within the jurisdiction of this court, and an effort by the administrator to withdraw them from the state, and the relief prayed was a moneyed judgment, an injunction restraining defendant from receiving, taking possession of, or collecting such assets and for an accounting. On demurrer, alleging no jurisdiction in the court of either the person or subject of the action: *Held*, that the demurrer was well taken, as this court has no jurisdiction of the person of the defendant as an administrator, because he was appointed in a foreign state. (*Hanlon agt. Page, ante, 328.*)
 8. In order to justify under section 2685 or section 2882 of the Code of Civil Procedure the revocation of letters of administration or letters of guardianship upon the ground that such letters were obtained by a "false suggestion of a material fact," it must appear that such false suggestion was made to the tribunal by which such letters were granted. (*Estate of Corn, deceased, ante, 357.*)
 9. Where executors are also trustees, they are entitled to commissions in both capacities, where the will contemplates a severance of duties, and a point of time at which those of the executor would be ended and those of the trustees begin, but where a portion of the trust estates consists of real property, the commissions should not be computed upon the value of the real estate subject to the trust, but only upon sums of money, or other equivalent, received and paid out. (*Wagstaff agt. Lowrey, 28 Barb.*, 209, overruled.) (*Phoenix agt. Livingston, ante, 400.*)

EXECUTION

1. The plaintiff issued execution on judgment against defendant, and the sheriff demanded payment of the execution. Then defendant made a general assignment, and thereafter the execution was returned unsatisfied, and a receiver was appointed on supplementary proceedings: *Held*, that the judgment and execution and the demand of payment under the execution in its life-time did not create a lien which can be enforced under sections 2436-2447 of the Code. (*Abeel et al. agt. Anderson, ante, 489.*)
2. An execution against the person of the defendant recited that it was issued upon a judgment recovered in the supreme court, in the city and county of New York, for fraud and the conversion and fraudulent

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disposition of property. It stated that the judgment had been docketed in the office of the clerk of the county of New York, and that an execution had been issued thereon to the sheriff of the county of Kings, where the defendant resided, which had been returned unsatisfied. *Held*, that these recitals were sufficient to sustain a direction for the sheriff to arrest the defendant. That it was not necessary that it should be stated in the execution that the judgment had been docketed in the office of the clerk of the county of Kings. Nor was it necessary that an execution against the property of the defendant should have been previously issued to the sheriff of the county of New York. (*O'Shea agt. Kohn*, 88 Hun, 149.)

3. An affidavit used to obtain an order, as provided in section 2436 of the Code of Civil Procedure, requiring a judgment debtor to appear and be examined as to property alleged to be held by him, which he unjustly refuses to apply towards the satisfaction of the judgment, is defective if it fails to show that the execution was issued within the five years allowed by section 1375 of the said Code, or, if after the expiration of five years, that an execution had been issued within that time or that the present execution was issued pursuant to the order of the court granted under section 1377 of the said Code. (*Hutson agt. Weld*, 88 Hun, 142.)

4. Such affidavit is also defective if it fails to state that a demand for the application of the property to the payment of the judgment has been made upon, and refused by the judgment-debtor. (*Id.*)

GENERAL TERM.

1. It is not essential to the validity of an order of the general term allowing an appeal to this court, in the cases wherein an appeal is not

permitted except when so ordered, that the general term making the order shall be composed of the same judges who constituted the general term which decided the case. The only restriction upon the power of the general term to make the order is that it shall be "made at the general term which rendered the determination or at the next general term after judgment is entered thereupon." (*Code of Civ. Pro.*, sec. 191, *subd. 2 and 3.*) (*Third Ave. R. R. Co. agt. Edling*, 100 N. Y., 98.)

GUARDIAN.

1. Upon an application for an appointment of a guardian of an infant, the surrogate has authority to direct that access to the infant shall be allowed by the guardian when appointed, to such persons as the surrogate may designate. (*Matter of Derickson Minors*, *ante*, 21.)

2. Where an infant would be entitled, but for his infancy, to letters of administration with the will annexed, the guardian of such infant is entitled to letters unless disqualified for some cause specified in the statute. (*Estate of Blank, deceased*, *ante*, 58.)

3. In order to justify under section 2685 or section 2882 of the Code of Civil Procedure, the revocation of letters of administration or letters of guardianship, upon the ground that such letters were obtained by a "false suggestion of a material fact," it must appear that such false suggestion was made to the tribunal by which such letters were granted. (*Estate of Corn, deceased*, *ante*, 357.)

1. A general guardian cannot sue in his own name to recover any personal property of his ward. The action must be brought in the name of the infant by means of the guardian *ad litem*. Code of Civil Procedure, secs. 468-470, 472, 474, 476. (*Buermann et al. agt. The*

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New York Produce Exchange et al., ante, 393.)

HABEAS CORPUS.

1. Under the provisions of the Code of Civil Procedure in reference to the writ of *habeas corpus* (sec. 2081 et seq.; see, also, similar provisions of Revised Statutes, 2 R. S. 587, sec. 83 et seq.), it is the duty of the court or judge issuing the writ, upon a hearing on return thereto, where it appears the prisoner is held in custody under a judgment or decree, to inquire into the jurisdiction of the tribunal to render the judgment or decree, and to discharge the prisoner where it appears there was a lack of jurisdiction over the person or the subject-matter. (*People ex rel. agt. Warden, etc., 100 N. Y., 20.*)

HUSBAND AND WIFE.

1. The constraint and duress which has generally availed to impeach a contract, even as to transactions between husband and wife, has proceeded from actual violence or well grounded fear of personal injury. An assent obtained through such means is regarded as neither freely or voluntarily given, and as creating no valid obligation. (*Wallach agt. Hoexter, ante, 196.*)
2. Where the evidence showed that the defendant executed the mortgage through the persuasion of her husband, and for his benefit, and through threats on his part that if she did not so, "he would come in and go out of the house as he pleased," and would "stay away from her at nights, and would withhold speech from her:"
Held, that although these threats may have constituted the chief reasons why she executed the mortgage, yet as in the end she consented to do, and did sign the papers voluntarily, there was no duress or illegal constraint exer-

cised sufficient to impeach the mortgage in the hands of an innocent lender of money within the meaning of those terms, as understood in the courts. (*Id.*)

HIGHWAYS.

1. The statute governing the laying of a private road is substantially complied with where in the application the general course is given as easterly or westerly, &c., and the exact course and distance can be determined from other particulars in the application, or by natural monuments referred to therein; the statute does not require that the courses shall be specified in the application by degrees and minutes. (*Satterlee agt. Winne, ante, 387.*)
2. The order laying out such road is fatally defective when it does not follow the description in the application, but differs essentially from it, unless the description in the application is deemed to be incorporated into the order. (*Id.*)
3. Commissioners of highways in laying out a private road have no discretion as to where they will lay it, but must lay it out as described in the application. (*Id.*)

IMPRISONED DEBTOR.

1. An application for the discharge of an imprisoned debtor may be made in the court out of which the execution is issued. (*Matter of Irving, Jr., etc., ante, 286.*)
2. The power of the old sheriff over prisoners ceases after ten days, and the new one has no power unless they are assigned to him. (*Id.*)
3. An outgoing sheriff who neglects to deliver over a prisoner to his successor is liable to the plaintiff in the execution as for an escape. (*Id.*)

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4. Where, on an application to discharge a debtor who was on the jail limits, it appeared from the papers that more than ten days had expired since the new sheriff assumed his office, and yet it did not appear that the imprisoned debtor had been assigned to him, but on the contrary, it appeared that he was in the custody of the late sheriff:

Held, that as the late sheriff's duties, powers and functions (except those specified by law) had ceased, it cannot be said that the defendant is imprisoned, especially as he is on the jail limits, and not actually confined:

Held, further, that the court could not proceed in the matter, as to act on this petition in the absence of proof that the prisoner has been duly assigned to the new sheriff might seriously impair the rights of the execution creditor as against the late sheriff or his bondsmen. (*Id.*)

5. A general guardian cannot sue in his own name to recover any personal property of his ward. The action must be brought in the name of the infant by means of a guardian *ad litem*. Sections 468, 469, 470, 472, 474, 476. (*Buermann et al. agt. The New York Produce Exchange et al.*, *ante*, 898.)

INDICTMENT.

1. Not more than one separate and distinct crime can be charged in an indictment—Code of Criminal Procedure, section 278—the objection should be taken by a demurrer—Code of Criminal Procedure, sec. 828, sub. 8—and is waived by a plea of not guilty—Code of Criminal Procedure, secs. 831, 464—when an indictment is defective in failing to sufficiently identify the property taken—the objection is waived if not taken by a demurrer—so also as to a failure to set forth

the value of the property taken. (*See People agt. Upton*, 88 *Hun*, 107.)

2. Power of the court to direct one of several persons, jointly indicted, to be tried separately—when evidence not alleged in the indictment is admissible in support of the charge of fraud there made—when evidence of a settlement with a third person is not admissible in favor of the party indicted. (*See People agt. Clark*, 88 *Hun*, 214.)
3. Larceny—what constitutes the crime under sections 528 and 531 of the Penal Code—sufficiency of the allegations of the crime in the indictment—what allegations are required as to the jury finding the indictment—duty of the district attorney to elect upon which count he will proceed. (*See People agt. Reavey*, 88 *Hun*, 418.)
4. Variance between its allegations and the proof—an objection must first be taken at the trial—how larceny is to be charged under section 528 of the Penal Code—charge as to reasonable doubt. (*See People agt. Oruger*, 88 *Hun*, 500.)

INFANT.

1. Where an infant would be entitled, but for his infancy, to letters of administration with the will annexed, the guardian of such infant is entitled to letters unless disqualified for some cause specified in the statute. (*Estate of Blanck, deceased*, *ante*, 58.)

INJUNCTION.

1. A property owner has the absolute right to prevent, by injunction, unauthorized trespassing upon his lands. (*Post et al. agt. Phelan et al.*, *ante*, 188.)

In this action, brought in the fifth judicial district to have a contract,

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entered into between the defendant corporation and other persons, declared void, and to restrain the defendant from purchasing the property, assets or franchises of another railroad company at a sale, upon the foreclosure of a mortgage given thereon, an injunction was granted restraining the defendant from bidding at such sale, accompanied with an order to show cause why it should not be continued during the pendency of the action. The order was dated November 21st, and was made returnable at a special term to be held in Syracuse on November 28th. It required the papers to be served on or before November 25th. On November 25th the defendant moved, *ex parte*, at a general term of the supreme court of the third department, held at the city of Albany, for an order vacating the injunction. *Held*, that the case was not one in which such an application might, under section 626 of the Code of Civil Procedure, be made at the general term without notice, and that the motion should be denied without expressing any opinion upon its merits. (*Geer* agt. *N. Y. C. and H. R. R. Co.*, 38 *Hun*, 231.)

2. That section confers the privilege of making such a motion only in special cases, where there is necessity for immediate action, and where delay would cause evil which could not be remedied. (*Id.*)

INTERPLEADER.

1. Where two claimants each claim the price of certain goods alleged by each of them respectively to have been sold and delivered by him to the purchaser.

Held, that (the necessary facts required by section 820 of the Code of Civil Procedure being shown) the purchaser is entitled to interplead them and be discharged from liability to either. (*Tynan* agt. *Cadenas*, *ante*, 78.)

2. *Sherman* agt. *Partridge* (4 *Duer*, 646) and *Trigg* agt. *Hits* (17 *Abb. Fr.*, 486) distinguished. (*Id.*)

3. The principle laid down in *Baltimore and Ohio R. R. Co.* agt. *Arthur* (90 *N. Y.*, 237) followed. (*Id.*)

4. Where upon the trial of an action in which interpleader was allowed under the Code, the plaintiff established title to part of the fund in court and the defendant to the balance, and on the pleadings each party denied all;

Held, that neither was entitled to costs "as of course," but that the award of costs in such cases rested in the discretion of the court. (*Cronin* agt. *Cronin*, *ante*, 184.)

5. The statutory interpleader, which is not in the nature of a suit in equity, but a remedy designed for use in common law courts, is a measure of relief to which suitors in a district court in the city of New York may resort. (*McElroy* agt. *Baer*, *ante*, 840.)

6. In the district courts, after the order of interpleader is made, a copy of the order and a copy of the complaint, drawn in conformity with the suggestion made in *Mouk's Van Santvoord's Pleadings*, should be served upon the party brought in by the interpleader. The order should require him to appear and answer the complaint in the same time that a defendant is required to answer a summons, and should provide that the money in court shall be paid to the plaintiff in case of the failure to appear and answer of the party interpleaded. (*Id.*)

7. If the party appear and answer, the issue raised may be tried by the court, unless a jury be demanded at the time of the joinder of issue. Upon the entry of judgment the money must be paid to the prevailing party, unless an undertaking sufficient to stay proceedings be

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given, and costs should be awarded against the losing party. (*Id.*)

JUDGMENT.

1. The action is for negligence, and the trial judge dismissed the complaint. Upon appeal the general term of the city court reversed the judgment and ordered a new trial. The defendants thereupon appealed to the court of common pleas, giving a stipulation for judgment absolute. The common pleas affirmed the order of the city court, general term, and gave "judgment absolute" in favor of the plaintiff:

Held, that as the damages were unliquidated, the assessment thereof must be had at the trial term before a jury. (*O'Donnell* agt. *Hecker et al.*, ante, 884.)

2. Sections 1214 and 1215 of the Code apply only to applications for judgment by default, and even in those cases the "writ of inquiry" may be executed at trial term if so directed. (*Id.*)

3. As to all matters, either of fact or law, which legally might have been and actually were litigated in an action or special proceeding between the same parties, in a court of competent jurisdiction, the judgment rendered therein is binding and conclusive in all litigations between the same parties. (*Hebrew Free School Association, &c.*, agt. *Mayor, &c.*, of *New York*, ante, 448.)

4. Where a former judgment between the same parties is given in evidence in a case on trial before a judge at special term, which judgment covers all the claims made by the plaintiff in such case, it is conclusive on the trial judge. (*Id.*)

5. By confession—when the statement of the facts out of which the debt arose is insufficient—Code of Civil Procedure, sec. 1274, subd. 2.

(*Citizens' National Bank* agt. *Allison*, 87 *Hun*, 185.)

6. Justice's judgment—no time is prescribed within which a transcript must be filed in the county clerk's office—subdivision 7 of section 382 of the Code of Civil Procedure does not limit the right of a party to issue an execution on a judgment so docketed. (*See Rose* agt. *Henry*, 87 *Hun*, 397.)

7. Receiver—an order appointing him has no extra territorial effect—right of the debtor to confess judgment, under which a foreign creditor takes the debtor's property from the receiver—contempt of court by the debtor—computation of the damages. (*See O'Callaghan* agt. *Frazer*, 87 *Hun*, 488.)

8. Receiver of a corporation—a judgment should be entered against him, as receiver, and not personally—when it may be so entered after he has been discharged as receiver. (*See Woodruff* agt. *Jewett*, 87 *Hun*, 205.)

9. Judgment taken on an inquest must be reviewed by motion, not by appeal—a judgment in a partition suit in chancery imports a seizure of the lands by the parties. (*See Greenleaf* agt. *Brooklyn, &c.*, *R. R. Co.*, 87 *Hun*, 485.)

10. Res adjudicata—the party seeking to avoid it must show that the issue in question was not decided—how the grounds of the former decision should be proved. (*Deer* agt. *Reed*, 87 *Hun*, 594.)

11. Notice of pendency of action—a party whose deed was delivered before, but is recorded after, the filing thereof is bound by the judgment—Code of Civil Procedure, sec. 1671. (*See Kindberg* agt. *Freeman*, 89 *Hun*, 466.)

12. When an allowance of a counter-claim in behalf of a defendant will

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be treated as a judgment recovered by him against the plaintiff. (*See N. Y., L. E. and W. R. E. Co. agt. Carhart, 39 Hun, 518.*)

13. When a husband cannot avail himself of a judgment recovered by his wife against the same defendant for the same accident. (*See Groth agt. Washburn, 39 Hun, 324.*)

14. Conspiracy to defraud—when notwithstanding the recovery of a judgment on the contract, an action will lie to recover damages resulting from the fraud. (*See Pratt agt. Wertheimer, 39 Hun, 468.*)

15. When a recovery of a penalty for violation of the game law in one action is a bar to other actions. (*See People agt. Robbins, 39 Hun, 187.*)

16. Admissibility of a judgment to show a peaceful entry into possession of premises. (*See Bradt agt. Church, 39 Hun, 263.*)

17. In ejectment—power of the court to set aside. (*See New Trial, 39 Hun, 713.*)

18. Where summary proceedings, instituted to remove a tenant holding under a lease executed by a firm, are founded upon an affidavit in which one of the members of the firm is described as the lessor, he must be regarded as representing the actual lessor, and a judgment therein against the lessee is to be considered as a judgment in favor of the firm. (*Nemethy agt. Naylor 100 N. Y., 562.*)

19. The informality does not invalidate the proceedings and judgment, and so is no objection to the judgment when collaterally brought in question; it may only be taken advantage of on objections taken in the proceedings. (*Id.*)

JURISDICTION.

1. Where defendant, a resident of Canada, was married in 1844 to K. in this state, and lived with him until 1860, when she returned to Canada, and he went to Ohio and there obtained a divorce for desertion. A copy of the summons was sent to her by mail, and she was present at the taking of the deposition, but took no part in it. She afterwards married plaintiff, he knowing the fact of her former marriage, and he now asks a divorce on the ground that she had a husband living at the time of her marriage.

Held, that the divorce obtained in Ohio was without jurisdiction, and so null and void, as was also the marriage in this state, and the divorce should be granted (*DANFORTH, MILLER and FINCH, JJ., dissenting*). (*O'Dea agt. O'Dea, ante, 271.*)

2. Where the defendant, who was a foreign administrator, was sued upon the guaranty of a bond, made by his intestate, and the complaint averred assets within the jurisdiction of this court, and an effort by the administrator to withdraw them from the state, and the relief prayed was a moneyed judgment, an injunction restraining defendant from receiving, taking possession of, or collecting such assets and for an accounting. On demurrer, alleging no jurisdiction in the court of either the person or subject of the action;

Held, that the demurrer was well taken, as this court has no jurisdiction of the person of the defendant as an administrator, because he was appointed in a foreign state. (*Hankinson agt. Paige, ante, 328.*)

3. Lien upon vessels—1862, chapter 482—a sale is void unless the facts required by the statute are stated in the application—the voluntary appearance of a lienor does not give jurisdiction over the sub-

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ject matter. (*Nelson* agt. *Yates*, 87 *Hun*, 52.)

JURY.

1. What is a *reasonable time*, is a question of fact for the jury. (*Wright* agt. *Bank of the Metropolis*, ante, 204.)
2. A challenge to the array, on the ground that the names of additional jurors were not properly drawn, will not be sustained, if the jurors were drawn "in open court," and "from the box directed by the court," even though no directions were given by the court, except by the formal order entered, where that specified the box as the one "containing the names of the trial jurors for said court." The fact that the other two boxes were not in court is a mere formal irregularity. (*People* agt. *Kiernan*, ante, 264.)

See EJECTMENT.

Martin agt. *Rector*, ante, 861.

3. Where, during a criminal trial, a jurymen went during a recess to the scene of the affray, without the permission of the court, for the purpose of acquainting himself with the locality and its surroundings, he is not guilty of a *criminal contempt*, for which he would be summarily punished by the court. (*People ex rel. Munsell* agt. *Ofer and Terminer*, ante, 418.)
4. A civil contempt may go beyond the statutory enumeration, and draw in what was usual or permissible at common law, but criminal contempt is precisely defined and barred in by the statute. (*Id.*)
5. A citizen of the city of Troy is qualified to sit as a juror by chapter 1, section 16, Laws 1816, in an action against such city; and the rejection by the court of such juror, otherwise competent, is ground for reversal, although the jurors who

actually tried the cause were competent. Parties have the right to have the first twelve competent jurors drawn, who are indifferent, and not discharged or excused, constitute the jury. (*Hildreth* agt. *City of Troy*, ante, 488.)

JUSTICE'S COURTS.

1. The plaintiff sued for \$333.33, and the court found that the plaintiff was entitled to recover this sum, but the recovery was reduced by independent counter-claims to \$5.20.

Held, that as the sum total of the accounts of both parties, proved to the satisfaction of the court, exceeded \$400, a justice's court would not have had jurisdiction of the action, and for this reason the plaintiff was entitled to full costs. (*Lablache* agt. *Kirkpatrick et al.*, ante, 61.)

JUSTICES OF THE PEACE.

1. In March, 1885, a transcript of a judgment, recovered by the plaintiff against the defendant in a justice's court in October, 1877, was docketed in the office of the county clerk of Dutchess county. *Held*, that it was error for the county court to deny a motion made by the plaintiff for leave to issue execution upon the judgment upon the ground that the transcript was not filed within six years from the date of the entry of the judgment in the justice's court. (*Ross* agt. *Henry*, 87 *Hun*, 397.)
2. Subdivision 7 of section 882 of the Code of Civil Procedure, barring action upon a judgment recovered in a justice's court, after the lapse of six years from the time it was rendered, has no effect upon the right of the party to issue an execution in the county court upon such a judgment after a transcript thereof has been docketed in the

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office of the county clerk. No time is prescribed within which the transcript of a justice's judgment must be docketed in the county clerk's office. (*Id.*)

LANDLORD AND TENANT.

1. In an action against the tenant of rooms in an apartment house, for rent, it appeared that the steam heat agreed by the landlord to be supplied was inadequate; that additional heat became essential to a proper enjoyment of the premises; that the flues and chimneys were defective or improperly constructed; that her apartments were often filled with dense smoke, and that the elevator service was inefficient:

Held, that these grievances were an obstruction to the beneficial enjoyment of the premises, constituting a constructive eviction, and justified the tenant's abandonment. (*Lawrence agt. Burrell, ante, 126.*)

2. In an action by a landlord to recover rent from a tenant for the month of November, under a written lease providing for the payment of rent in advance on the first of each and every month, and upon the rent for November being demanded of her on the first day she refused to pay, and on the afternoon of the same day she personally left the house, but her subtenants continued in possession. The tenant claims that the character of the house was bad, though represented to her differently at the time she leased it.

Held, that the tenant was liable for November rent. (*Conklin agt. White, ante, 507.*)

3. Where the landlord has not accepted a surrender of the premises or exercised dominion over them by virtue of any abandonment and surrender until after the rent became due, the tenant is not, and hereby relieved from the payment of rent already accrued. (*Id.*)

4. Where the defendant admitted having discovered in the month of June, 1884, the bad character of the house:

Held, that as she then knew that the representations made to her were false, it was her duty to affirm or disaffirm the contract; but having kept the house until the first day of November, and paid the rent in full until that time, she did not exercise her election of rescinding the contract within a reasonable time, and is therefore liable for November rent. (*Id.*)

LEASES.

See NEW YORK (CITY OF).
Mayor, etc., of New York agt. Fulton Market Fishmongers' Association, ante, 491.

LIBEL.

See EVIDENCE.
Crosley agt. Cobb, ante, 88.

LIEN.

1. Where defendant was a livery stable-keeper, and one W. left with him, at his stable, for board and keep, three horses; the same had been at his stables since and prior to January 1, 1884, and on June 30, 1884, W. owed the defendant for such board and keep at an agreed price, \$341.50, no part thereof having been paid, and W. had given the defendant his own note for the debt, which covered the board and keep of the horses until about June 30, 1884, but the note had never been paid; on July 2, 1884, the defendant served a notice of his lien on the plaintiffs, and also left a copy for W. at his last known place of residence. The plaintiffs purchased the horses from W. about June 11, 1884. The defendant did not know of the sale until about June 15, 1884, when plaintiffs called to see

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him in regard thereto, and the plaintiffs had already paid W. for the horses.

Held, that an inchoate lien attached when the horses were placed in the stable; it is waived if the statutory notice be not given; it becomes effective and complete when such notice is given, relating back and embracing all the charges due. (*Lessells et al. agt. Farnsworth, ante, 78.*)

2. From the time of giving such notice the lien becomes complete, and when made effective by the notice, it covers all charges for care, keep and board while the horses were kept and cared for by the stable-keeper. (*Id.*)

3. The acceptance by defendant of W.'s own note (which was never paid) does not operate as a waiver of his lien, nor can the doctrine of estoppel aid the plaintiffs. (*Id.*)

4. Any person, who by labor and skill imparts additional value to personal property, acquires a common law lien thereon which is not lost by taking the promissory note of the debtor, payable to their order, provided possession of the property be retained, and before demand therefor, the debtor becomes insolvent and the note is in consequence dishonored. Nor does the negotiation of the note divest the lien if the lien holder is obliged to provide for its payment. (*Myers agt. Uptagrove et al., ante, 816.*)

5. The surrender of the note upon the trial is in such a case sufficient. (*Id.*)

6. Where labor is done under one contract a delivery of part of the property does not defeat the lien upon the remainder for the entire consideration. (*Id.*)

7. Under chapter 496, Laws of 1873, as amended by chapter 145, Laws of 1880, a livery stable keeper has

the right to detain horses until all charges for their board and keep are paid, provided he serves a notice, in writing, containing the amount of the charges and of his intention to detain the animals therefor. (*Lessells agt. Farnsworth, ante, 864.*)

8. The livery stable keeper has a reasonable time after the board becomes due in which to prepare his bill of charges and serve the notice of lien, and the right to such lien is not cut off by a sale of the animals by the owner before the statutory notice is given. (*Id.*)

9. The statute is a remedial one and should be liberally construed. (*Id.*)

10. The possession of the animals by the stable keeper is constructive notice to a purchaser of the right to the lien (*affirming S. C., ante, 78.*) (*Id.*)

See EXECUTION.

Abel et al. agt. Anderson, ante, 489

LIVERY STABLE KEEPER.

See LIEN.

Lessells et al. agt. Farnsworth, ante, 78.

Lessells et al. agt. Farnsworth, ante, 864.

MANDAMUS.

See SUPERVISORS.

People ex rel. Supervisors of Ulster Co. agt. City of Kingston, ante, 452.

MANUFACTURING CORPORATIONS.

1. The limitation of "twenty days," contained in section 12 of chapter 40 of the Laws of 1848, applies only to the act of making the annual re-

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port, and not to the filing and publishing of such report; but the filing and publishing should be done within a reasonable time after the twenty days. (*Butler agt. Smalley, ante, §256.*)

2. Where the report was made and delivered to the secretary, who published it the next day, the 18th of January, but by his mistake it was not filed until the 18th day of February, it is not such a default as will make the trustees personally liable. (*Id.*)
3. As to what would be reasonable time depends upon the circumstances of the case. (*Id.*)
4. Where the order has not been filed within the twenty days, the procuring of an order directing its filing *nunc pro tunc* would not relieve the trustees of liability, if the statute actually required that the filing be within twenty days. (*Id.*)

MORTGAGE.

1. A gave three mortgages to C, through D, the latter's attorney, for moneys loaned, one dated October 2, 1882, and the other two dated February 17, 1883. The attorney, D, handed the bonds to C, and retained the mortgages for record. He caused the first mortgage to be recorded, but the last two were never recorded. On September 13, 1883, A executed a bond and mortgage to the American Baptist Home Mission Society upon the property covered by C's recorded mortgage. On January 11, 1884, he executed mortgages to the same society upon the property covered by C's unrecorded mortgages, which mortgages to the society were recorded. Mr. D, the attorney for C, was also an officer of, and counsel for, the society. It was for funds of the society in his hands and chargeable to him for reinvestment that he undertook

to turn into the society the bonds and mortgages referred to. A few months thereafter he made an assignment for his creditors:

Held, that as against C, the relation between D and the society was that of debtor and creditor, and the taking of the bonds and mortgages for D's antecedent debt did not constitute it a mortgage for a valuable consideration, so as to be entitled to take advantage of the fact that its mortgages were first duly recorded. The claim that C being also an officer of the society should have prevented D from acting as he did, and that his executors were, therefore, estopped from enforcing their mortgages against the society is not tenable, C's rights having accrued before any wrong was perpetrated upon the society. (*Constant et al. agt. The American Baptist Home Mission, ante 517.*)

MOTIONS AND ORDERS.

1. It is not essential to the validity of an order of the general term allowing an appeal to this court, in the cases wherein an appeal is not permitted except when so ordered, that the general term making the order shall be composed of the same judges who constituted the general term which decided the case. The only restriction upon the power of the general term to make the order is that it shall be "made at the general term which rendered the determination or at the next general term after judgment is entered thereupon" (*Code of Civ. Pro., sec. 191, subd. 2 and 3*). (*Third Ave. R. R. Co. agt. Ebling, 100 N. Y., 98.*)
2. Where an order of general term, reversing a judgment entered on the report of a referee, omits to state that the reversal was upon the facts as well as the law, so far as the facts are concerned, it is for this court, on appeal from the order, simply to determine if there was any evidence sufficient in law

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to sustain the judgment. (*Kane* agt. *Cortsey*, 100 N. Y., 182.)

3. A surrogate has no authority to make an *ex parte* order, decreeing an allowance payable out of the estate to a special guardian of an infant unsuccessfully contesting the probate of a will; notice to the other parties interested in the estate is requisite. (*In re Budlong*, 100 N. Y., 208.)
4. Whether a court shall modify or change an order already made by it is a question addressed to its discretion, and over its exercise an appellate court has no control. (*Place* agt. *Hayward*, 100 N. Y., 626.)

MUTUAL BENEFIT ASSOCIATION.

1. A person has a legal right to provide, through a mutual benefit association, insurance for the benefit of his family, and designate the beneficiaries who should receive the benefits thereof after his death, exclusive of the claims of creditors. (*Matter of Wendell*, ante, 68.)
2. Moneys received from such benefit associations do not become assets in the hands of executors to be accounted for as a part of the estate. The certificates are not, during the lifetime of a testator, liable to be seized by legal process to pay his debts, and the moneys realized therefrom after his death do not become assets to be accounted for and applied to the payment of the claims of creditors, or for distribution among the next of kin. (*Id.*)
3. Where the testator, during his lifetime, became a member of two benefit insurance associations, and held the usual certificates of membership therein, the benefit being made payable to his mother, and afterwards, for the purpose of providing for payment of the benefits to the wife and mother, by concurrence of the parties, the mother assigned the certificates to the executor and executrix (the latter being the wife of the testator), by an assignment in writing, by which it was provided that \$8,000 to be realized therefrom should be kept upon trust by the assignees, the interest to be paid to the assignor during her life, and upon her death the principal to the wife. The deceased at the same time made his will, in which he expressed a desire and intention that \$8,000 be safely invested by the executor and executrix (who are the same persons named in the assignment), and the income thereof be paid to his mother during her life, and upon her death the principal fund to his wife, her heirs and assigns, and the balance, \$1,000, to be paid to his said wife. After testator's death, his will was duly proved and the executor and executrix obtained the money.
Held, that these moneys did not become assets in the hands of the executor and executrix, and they were not to be accounted for as a part of the estate, or to be applied to the payment of the claims of creditors. (*Id.*)
4. Solomon W. Kaiser joined the "Mutual Relief Association," and designated "his legal heirs" as the beneficiaries of the death benefits, aggregating \$1,000:
Held, (1) that the designation was valid; (2) that the phrase "legal heirs" means next of kin or relatives by blood, and excludes the widow; (3) that the designation once legally made cannot be revoked by a new designation made by the last will of the deceased member, and (4) that under the designation originally made the brother and only legal heir of the deceased was entitled to take the fund to the exclusion of the widow, and notwithstanding the will. (*Kaiser* agt. *Kaiser*, ante, 104.)

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NEW TRIAL.

1. Granting new trials on the ground that the damages are excessive, in cases where the jury are allowed to award smart money, is comparatively a modern practice, and had its origin in the English courts. *Buffalo Lubricating Oil Co. agt. Boerest, ante, 179.*
2. In cases where the court can see, without mistake, the amount mentioned in the verdict as punitive damages, it is now the universal practice to examine the whole case with care, and determine whether the sum so included is so large as to shock the judgment of most intelligent and dispassionate men. (*Id.*)
3. Where, as in this case, there is no chance for mistake, and the jury did allow \$16,000 as smart money as a punishment to the defendants for enticing away a servant from the plaintiffs, who at the time he left its employ, was one of its stockholders and chief executive officers, a new trial should be granted on the ground that the damages are excessive. (*Id.*)
4. The power given by section 527 of the Code of Civil Procedure of ordering a "new trial, if satisfied that the verdict * * * was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below," was intended to be exercised by the supreme court alone, and does not apply to this court. (*People agt. Donovan, ante, 855.*)
5. Under the authority conferred by section 1525 of the Code of Civil Procedure, the court, upon an application made within two years by a party against whom a second final judgment has been rendered in an action for the recovery of real property, may make an order vacating

the second judgment and granting a new trial, upon the payment of all costs and all damages, other than for rents and profits, if it is satisfied that justice will be thereby promoted, and the rights of the parties will be more satisfactorily ascertained and established, even though no error, which would support an appeal, has been committed upon the trial, and though the evidence was sufficient to support the verdict of the jury, and there is no claim, on the part of the applicant, of surprise or newly discovered evidence. The discretion to be exercised by the court is legal as well as judicial, and must have some reason for its support. (*Kessler agt. Dennis, 89 Hun, 18.*)

6. The question as to whether or not there is any substantial ground for the exercise of the discretion is subject to review by the appellate court, upon an appeal from the order made by the court below. (*Id.*)

NEW YORK (CITY OF).

1. The legislature has power to regulate the use of piers and wharfs in the city of New York, although the same are the property of the corporation. (*Mayor, &c., of New York agt. Fulton Market Fishmongers' Association, ante, 491.*)
2. The legislature has also the power to regulate the taking or making of leases of real estate by the corporation of the city of New York. (*Id.*)
3. The defendants, the Fulton Market Fishmongers' Association, was incorporated by chapter 277 of the Laws of 1869, and by section 8 of said act the commissioners of the sinking fund were authorized to lease to said corporation the present fish market, with portions of the piers adjoining on either side, for a term not exceeding ten years, and

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providing for the construction of new buildings for a fish market. Pursuant to that act a lease was made for ten years, and in 1879 a new lease for ten years was made. This action is brought to recover two quarters' rent in 1884 under this lease. The commissioners of the sinking fund, under the act of 1883, amending the act of 1869, duly authorized the execution of the lease relied on by the defendants, on condition of the surrender of the then existing lease and of the execution of the new lease by them. This lease having been approved by the counsel to the corporation, was executed by the defendant and also by the mayor, but the seal of the city was not affixed thereto. Defendants surrendered the old lease.

Held, that the act of 1883, amending the act of 1869, is not in conflict with the constitution of this state, and these acts do not in any way violate the corporate rights of the city of New York. (*Id.*)

4. Though the clerk of the common council should sign any leases made by lawful authority, and should fix the seal of the city upon all such leases, as he is made by section 76 of the consolidation act the custodian of such seal, and his signature is thereby required to be fixed to all leases made by the city, yet as defendants have done everything in their power to carry out their contract with the city, it does not rest with the plaintiffs to assert that the old contract, which was abrogated by the new, is still in force in consequence of the wrongful act or insubordination of their agent. (*Id.*)

See CIVIL SERVICE.

The People ex rel. Ryan agt. The Civil Service Supervisors, ante, 40.

See POLICE RELIEF FUND.

The People ex rel. Murray agt. McClave, ante, 8.

NON-RESIDENT.

See STATUTE OF LIMITATION.

Howe agt. Welch, ante, 465.

NOTICE (Rule 2.)

1. Where the address of the attorney was omitted from the notice of entry, &c., on the copy of a general term order served, but the copy of judgment for costs served on appellant's attorney was indorsed with the address of relator's attorney, and also with a notice that the paper served was a copy of a judgment of affirmance, with costs, and giving the date and place of its entry:

Held, to be a proper notice under rule 2. (*People ex rel. Wallkill Valley R. R. Co. agt. Ketor*, ante, 210.)

2. When a defect in a notice of entry of judgment is waived by an admission of its due and proper service—to review an interlocutory judgment on an appeal from a final judgment, the former must be specified in the notice of appeal—Code of Civil procedure, secs. 1301, 1316—the court cannot amend the notice by inserting such reference. (*See Patterson agt. McCunn* 88 Hun, 531.)

PARTIES.

1. The plaintiff having, after the commencement of this action, made a general assignment for the benefit of his creditors, the defendant obtained an order staying all proceedings herein until the assignee should cause himself to be substituted as plaintiff. On the hearing at special term the assignee opposed the application. *Held*, that the order was improperly granted, and that it should be reversed. (*Lawson agt. Town of Woodstock*, 37 Hun, 352.)
2. The provisions of section 449 of the Code of Civil Procedure, requiring an action to be prosecuted

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in the name of the real property in interest, is modified by section 756 thereof, which allows an action to be continued in the name of the original party, although he may have transferred his interest therein to another person. (*Id.*)

3. In this action, brought to procure a partition of real estate among the owners thereof, the plaintiff, a tenant in common, joined with himself as a co-plaintiff his wife, who had an inchoate right of dower in his share. *Held*, that in so doing he did not violate the provisions of section 1588 of the Code of Civil Procedure, providing that in actions for partition "no person other than a joint tenant or a tenant in common of the property, shall be a plaintiff," and that a demurrer interposed upon the ground of a misjoinder of parties plaintiff should be overruled. (*Poster* agt. *Poster*, 88 *Hun*, 366.)

See EJECTMENT.

Martin agt. *Rector*, ante, 861.

PARTITION.

See PRACTICE.

Curry agt. *Colgan*, ante, 26.

PARTNERSHIP.

1. The firm of A. & S. being indebted to B. on over due notes for money loaned, and to C. on notes not due for loans, A. without his partner's knowledge, in order to enable suit to be brought on these claims, in the city court, gave the firm's notes, maturing in a few days, to B. and to C., who thereupon began suit upon them. The summons was served only upon A., who made no defense, and judgment was entered by default: *Held*, that these judgments are not fraudulent as against creditors. (*Nealis* agt. *Adler et al.*, ante, 207.)

2. The law of New Jersey provides that in case of a special partnership, the special partner shall, before the filing of the certificate, "contribute in actual cash payments a specific sum as capital to the common stock."

Held, that the delivery of a check payable at sight is not a compliance with the statute. (*McGinnis* agt. *Furrelly et al.*, ante, 388.)

PAYMENT INTO COURT.

1. Where a tender has simply the effect to extinguish a lien, and does not discharge the debt, payment into court is not required. (*Cass* agt. *Higenbotam*, 100 *N. Y.*, 248.)
2. *It seems* the provision of the Code of Civil Procedure (sec. 782), in reference to tenders, refers only to that class of tenders which satisfy and discharge the debt. (*Id.*)

PENAL CODE.

1. Section 28—Morbidity propensity to drink—effect of, as a defense for one tried for murder. (*See People* agt. *Otto*, 88 *Hun*, 97.)
2. Section 96—Perjury—when a witness testifying under an honest mistake is not guilty of that offense. (*See People* agt. *Dishler*, 88 *Hun*, 175.)
3. Sections 148, 528, 581—Larceny—what constitutes the offense under sections 528 and 581 of the Penal Code—distinction between that crime and the offense provided for under section 148. (*See People* agt. *Reavey*, 39 *Hun*, 364.)
4. Section 282—What is the age of legal consent within subdivision 1 of section 1743 of the Code of Civil Procedure. (*See Moot* agt. *Moot*, 37 *Hun*, 288.)
5. Section 282, subd. 1—Abduction—

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what facts constitute the offense. (*See People agt. Seely*, 37 Hun, 190.)

6. Sections 282, 283—To support a conviction under the Penal Code for abduction (*sec. 282, as amended by sec. 2, chap. 46, Laws of 1884*), it must be proved both that there was a "taking," within the meaning of the act, and that such taking was for the purposes of prostitution.

The word "taking" implies some persuasive inducement on the part of the accused, not a mere permission or allowance to follow a life of prostitution.

A conviction cannot be sustained upon the unsupported evidence of the female alleged to have been abducted, as to either element constituting the crime, *i. e.*, the taking or the intent.

Proof must be given, aside from her testimony, tending to establish the commission of the crime, and that it was perpetrated by the accused. (*The People agt. Plath*, 100 N. Y., 590.)

7. Section 291—Under section 291 of the Penal Code, the commitment of a child found begging in the streets, does not make such commitment absolute, final or unconditional, but such commitment is to be governed by the charter and rules of the institution to whose care he is consigned.

Heretofore, under the consolidation act the magistrate could commit the destitute child to but one of the three specified institutions, and the only effect of the first alternative of section 291 is to permit the magistrate to commit such child to any charitable or reformatory institution authorized by law to take charge of minors; but in every case the institution so authorized was left to take and hold the child for the time, and in the manner and under the regulations prescribed by its fundamental law. (*People ex rel. Van Heck agt. New York Catholic Protectory, ante*, 843.)

8. Section 291—Power of a magistrate to commit children to charitable institutions—relative priority of provisions of the "consolidation act" (*chap. 410 of 1882*), sections 1618-1624, and of the Penal Code. (*See People ex rel. Van Heck agt. Catholic Protectory*, 38 Hun, 172.)

9. Section 292—Employment of children in a dangerous business—1876, chapter 122 was repealed by section 292 of Penal Code. (*See Ryan agt. Buchanan*, 37 Hun, 425.)

10. Section 351—Power of the court to sentence for a part only of the term fixed by the statute—Penal Code, *sec. 351*—in case of an erroneous sentence the case will be remitted for further sentence. (*See People agt. Bauer*, 37 Hun, 407.)

11. Section 528—How larceny is to be charged under this section. (*See People agt. Cruger*, 38 Hun, 500.)

12. Section 528—Larceny—procuring goods by false representations—evidence as to the intent with which the act was committed—when the schedules of an assignee are inadmissible as against the assignor. (*See People agt. Moore*, 37 Hun, 84.)

13. Section 528—Larceny—an undelivered satisfaction-piece of a mortgage is not the subject of larceny—Penal Code, section 718, subdivision 15, 536. (*See People agt. Stevens*, 38 Hun, 62.)

14. Sections 528, 531—Larceny—what constitutes the crime under said sections. (*See People agt. Reavey*, 38 Hun, 418.)

15. Section 536—Larceny—an undelivered satisfaction-piece of a mortgage is not the subject of larceny—Penal Code, sections 528, 718, subdivision 15. (*See People agt. Stevens*, 38 Hun, 62.)

16. Section 718, subdivision 15—Larceny—an undelivered satisfac-

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tion-piece of a mortgage is not the subject of larceny—Penal Code, sections 528, 536. (*See People* agt. *Stevens*, 38 *Hun*, 62.)

PIERS AND WHARFS.

See NEW YORK (CITY OF).

Mayor, &c., of New York agt. *Fulton Market Piersongers' Association*, ante, 491.

PLEADING.

1. A complaint in an action against a trustee to charge him with a corporate debt by reason of the failure to file an annual report, when verified requires a verified answer. (*Gadsden* agt. *Woodward*, ante, 109.)
2. In such an action the defendant would be obliged to testify, if called as a witness, against himself, and is not privileged under section 887 of the Code; disproving *Hughan* agt. *Woodward* (2 *How. Pr.* [N. S.], 127). (*Id.*)
3. The action is not one specified in 1214 of the Code, and judgment cannot be entered by application to the clerk, but an application must be made to the court. (*Id.*)
4. Where a defendant is served with a verified summons and complaint in an action to charge him as a trustee of a corporation with a corporate debt, by reason of the failure of the corporation to file an annual report, he must serve a verified answer, and the plaintiff will not be compelled to receive an unverified answer. (*Id.*)
5. Where the plaintiff, in such an action, upon the service of an unverified answer to a verified complaint, returned the answer with notice that the plaintiff elected to treat it as a nullity and thereupon entered judgment without application to the court. *Held*, that the order of the special term refusing to vacate such a judgment was erroneous, and that the judgment should be vacated because the action was not an action on contract within the meaning of section 1214 of the Code. (*Id.*)
6. In an action to dissolve a corporation brought under the provisions of section 1785 of the Code of Civil Procedure, is not material whether the defendant is a manufacturing, &c., corporation or not, as the section refers to all corporations created by or under the laws of the state. (*People, &c., of New York* agt. *Excelsior Gas-light Co.*, ante, 187.)
7. When the dissolution is claimed by reason of the insolvency of the corporation and the complaint, in addition to an allegation that the defendant has been unable to meet its obligations, and that it has failed to pay a certain judgment, which the answer alleges has been paid, it alleges that the said defendant has not a dollar in its treasury, and is insolvent and has been for at least a year past, the answer not denying this allegation, but alleging payment of the judgment and averring that the said company has no liability to creditors by way of judgments unsatisfied;
Held, that, on the pleadings the plaintiff is entitled to judgment. (*Id.*)
8. Insolvency means a general inability to answer in the course of business the liability existing and capable of being enforced. A corporation, like an individual, is insolvent when it is not able to pay its debts. It may be insolvent although no judgments have been recovered against it. (*Id.*)
9. Where the complaint was on a promissory note given by defendant to plaintiff and verified in the personal knowledge of the plaintiff and the answer verified in the usual

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form: (1) denied the indebtedness for which note was given, or that plaintiff presented note for payment; (2) upon information and belief denies the giving of note mentioned in complaint or any note; that if plaintiff has such note it was obtained by fraud, &c., while defendant was intoxicated. The plaintiff presented affidavits showing that the transactions were in the personal knowledge of the parties and that the answer was false. These questions were not disputed by defendant:

Held, that the answer was bad; the first defense being clearly frivolous, and the second defense being in the alternative and relating to personal transactions between plaintiff and defendant, and the allegations denying them being on information and belief does not create an issue and is sham. (*Berrigan* agt. *Oviatt*, ante, 199.)

10. In an action for damages for an alleged trespass upon lands, where the plaintiffs were M. B., the widow of P. B., deceased, and four infant children, and heirs of deceased, who sued by guardian, the complaint alleged that the widow had a dower interest in the premises in question, and the infants were owners of the premises as tenants in common, subject to the dower interest of the widow. It is also alleged that all the plaintiffs were in possession of the premises at the time of the alleged trespasses. The answer contained a general denial of the allegations of the complaint, except as admitted, and alleges, for a further defense, that one of defendants was the lessee of certain premises in the same town as the premises claimed by the plaintiffs, and that the house mentioned in the complaint stood on the premises of the defendant, and that she removed it from her own premises, as she had a right to do.

Held, that the allegations thus referred to directly put in issue the title to the *locus in quo*, and enti-

tled the plaintiffs to costs. (*Boyle et al.* agt. *Lawton et al.*, ante, 444.)

11. Not only does the complaint allege title in the infant plaintiffs, subject to the dower interest of the widow; but the answer takes issue with that allegation, *first*, by denying it, and, *secondly*, by alleging title in the defendant as lessee of the soil on which the house stood, the removal of which was one of the trespasses alleged. (*Id.*)

12. The first count of the complaint in this action alleged that from about May 1, 1884, to January, 1885, the plaintiff pastured, fed and took care of, and furnished hay and other feed for fifty-two head of cattle belonging to the defendants, at the defendants' request, and that such pasturing, &c., was reasonably worth \$600. The second count alleged that the plaintiff pastured a like number of cattle belonging to the defendants, under a special agreement made between the plaintiff and the defendants about May 1, 1884, by the terms of which the defendants agreed to take said cattle to the city of New York and sell them on or before October 1, 1881, and after deducting the purchase price of the cattle and the cost of transportation, to pay the plaintiff two-fifths of the remainder of the proceeds of the sale. The third count alleged a like agreement made between the defendants and one Peters, and that Peters had assigned his cause of action thereunder to the plaintiff. It appeared from an affidavit read by the plaintiff that the defendants might claim to have made the agreement with Peters, who in fact acted as an agent for the plaintiff. *Held*, that the court erred in granting a motion made by the defendants, to compel the plaintiff to elect upon which of the three counts he would proceed to trial. (*Blank* agt. *Hartshorn*, 37 Hun, 101.)

13. Bill of particulars—when not

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- allowed in an action for malicious prosecution. (*See Lane agt. Williams, 87 Hun, 388.*)
14. Variance between the proof and the allegations of the complaint—when immaterial. (*See Brock agt. Knowler, 87 Hun, 609.*)
15. Action for a slander of title—malice must be alleged—joinder of causes of action. (*See Dodge agt. Colby, 87 Hun, 515.*)
16. This action was brought by the plaintiff, as one of the two residuary devisees of one Josephine O. B. Webster, deceased, against the executors and trustees of the latter, the other residuary legatee (who refused to join as plaintiff), and a person who was alleged to be indebted to the estate by virtue of a lease given to him by the deceased before her death. The complaint alleged that the executors and trustees had, by a failure to exercise due care and diligence, failed to collect all the rent falling due upon the lease, but had collected only a portion thereof; that their accounts, showing the receipt of a portion of the rent, had been filed and passed by the surrogate; that the plaintiff had employed a competent attorney to file objections thereto, but that the attorney never filed the objections, or if he filed them withdrew them without her consent, and that the plaintiff did not know that the executors had failed to account for all the rent, until after the accounting had been had and the decree had been entered. That the plaintiff had requested the executors and trustees to bring an action to recover the rent unpaid, but that they had refused to do so. Judgment was asked against the defendants severally for the recovery of the amount of the rent which had not been paid to the executors. *Held*, that there was an improper joinder of causes of action, one against the executors and trustees for negligence, and one against the lessee
- upon contract. (*Compton agt. Hughes, 88 Hun, 877.*)
17. That the complaint failed to state a cause of action as the rent received had been accounted for, and the decree, so long as it stood unreversed, settled that fact. (*Id.*)
18. A defendant in an action of libel pleading a justification should be required, in a proper case, to furnish a bill of particulars. (*Ball agt. Evening Post Publishing Co., 88 Hun, 11.*)
19. The only proper office of a bill of particulars is to give information of the specific proposition for which the pleader contends, in respect to any material and issuable fact in the case, but not to disclose the evidence relied upon to establish any such proposition. (*Id.*)
20. To constitute a good answer in justification, in an action of libel, it is not enough to state that the alleged libelous matter complained of is true; the particular facts must be stated which evince the truth of the imputation upon the plaintiff's character, whether the imputation is of a general or specific nature. (*Id.*)
21. This rule requires only a statement of the necessary facts, and not of the evidence of those facts. (*Id.*)
22. The rule is the same in respect to pleading mitigating circumstances. (*Id.*)
23. The complaint in this action, brought by a wife against her husband, stated facts sufficient to constitute a cause of action for an absolute divorce on the ground of his adultery, and also other facts sufficient to constitute a cause of action for a separation. It prayed for a separation, that the defendant be compelled to make provision for the defendant's support, and for

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such other and further relief as might be equitable. *Held*, that the complaint was demurrable upon the ground that two causes of action had been improperly united therein. (*Zorn* agt. *Zorn*, 88 Hun, 67.)

24. That the fact that the two causes of action were not separately stated and numbered, as required by the Code and Rules of Practice, did not deprive the defendant of his right to demur. (*Id.*)

25. In the summons and complaint in this action Albany county was designated as the place of trial. Neither party resided in that county. The defendant, which had its principal place of business in Kings county, demanded that the place of trial be changed to Kings county. The plaintiff, who resided in Rensselaer county, thereupon amended his complaint by designating Rensselaer county as the place of trial. Upon the defendant's motion coming on it was defeated upon the ground that the proper county was designated in the amended complaint. *Held*, that this was error, as the complaint could only be amended, without prejudice to the proceedings already had. (*Rector* agt. *Ridgewood Ice Co.*, 88 Hun, 293.)

26. The complaint alleged that the defendant held the legal title to certain premises under a trust to convey the one equal undivided one-half thereof to the plaintiff, and the other like one-half to Eliza Bull, the defendant's wife; that the defendant, though often requested so to do, refused to make a conveyance of his interest therein to the plaintiff; that the defendant had been in the use and enjoyment of the said premises and was entitled to certain credits, and refused to account to the plaintiff; the complaint then demanded judgment for an accounting and a conveyance. *Held*, that a demurrer interposed upon the ground that Eliza Bull, the other *cœtui que trust*, was not made

a party, was properly overruled as she was not a necessary, though she might be a proper party to the action. (*Wing* agt. *Bull*, 88 Hun, 291.)

27. An answer, by which "the defendant denies any knowledge or information sufficient to form a belief as to every allegation in the complaint not hereinbefore admitted," will be held in the third department to put in issue the facts alleged in the complaint and not specifically admitted by the answer, where the denials are so specific as to clearly point out the allegations of the complaint to which they are intended to apply. (*Tracy* agt. *Baker*, 88 Hun, 263.)

28. In an action to recover damages to the amount of \$10,000, arising upon a purchase of cod oil from the defendant, the plaintiff alleged injuries to buckskins tanned by him, by reason of the bad quality of the oil, and that he lost customers, "piano manufacturers to whom he had been accustomed to sell said skins, and who purchased the same to be used in their business of manufacturing pianos." *Held*, that it was error to refuse to compel the plaintiff to furnish a bill of particulars stating the names and addresses of the piano manufacturers whose custom had been lost. (*Krajt* agt. *Dingee*, 88 Hun, 345.)

29. In this action brought to recover damages for seduction under a promise of marriage, the complaint alleged in separate paragraphs, first, the promise of marriage; second, the plaintiff's readiness to marry; third, the defendant's representation that he was unmarried; fourth, the seduction of the plaintiff under the promise of marriage; and fifth, the defendant's refusal to marry. The answer first denied "each and every allegation in said complaint contained, except so much thereof as may be hereinafter admitted," and second, admit-

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- ted that he had an acquaintance with the plaintiff, but denied "each and every other part of the fourth allegation in said complaint contained. *Held*, that the denial was sufficient, and that a motion to have the answer made more definite and certain was properly denied. (*Minget* agt. *Black*, 88 Hun, 358.)
80. Not more than one separate and distinct crime can be charged in an indictment—Code Criminal Procedure, sec. 278—the objection should be taken by a demurrer—Code Criminal Procedure, 823, subd. 8—and is waived by a plea of not guilty—Code Criminal Procedure, secs. 831, 464—when an indictment is defective in failing to sufficiently identify the property taken—the objection is waived if not taken by a demurrer—so as to a failure to set forth the value of the property taken. (*See People* agt. *Upton*, 88 Hun, 107.)
81. Action against a trustee of a corporation for a failure to file a report—the defendant cannot serve an unverified answer—Code of Civil Procedure, secs. 523, 827. (*See Gadsden* agt. *Woodward*, 88 Hun, 548.)
82. Action to try title to office—Code of Civil Procedure, secs. 1948, 1953—effect of not denying unnecessary allegations in a complaint—title to office can only be questioned by the people. (*See People ex rel. Cornell* agt. *Knox*, 88 Hun, 286.)
83. When an entire defense cannot be stricken out as irrelevant—a pleading will not be stricken out because it does not state a good cause of action. (*See Hubbard* agt. *Gorham* 88 Hun, 162.)
84. Action for libel—a demurrer will not lie, if the words can be so construed as to be libelous, although also capable of an innocent meaning. (*See Patch* agt. *Tribune Association*, 88 Hun, 368.)
85. Defect of parties, when waived, unless the objection is taken by answer. (*See McCroery* agt. *Gordon*, 88 Hun, 467.)
86. Bill of particulars in an action for libel—a party cannot be compelled to disclose his evidence—a bill of particulars cannot be required as to matters pleaded only in mitigation of damages. (*See Newell* agt. *Butler*, 88 Hun, 104.)
87. A bill of particulars will not be allowed where the information sought for lies peculiarly within the knowledge of the defendant. (*See Fink* agt. *Jetter*, 88 Hun, 168.)
88. In this action, brought against the maker and indorser of a promissory note, the complaint, after declaring in the usual form upon the note, stated that the note was made and indorsed for the purpose, by such indorsement, of giving credit to the maker and to induce the plaintiff to sell goods, wares and merchandise to him, and that the note was passed to the plaintiff in payment for such goods and merchandise. The defendant having demanded a verified bill of particulars of the merchandise so sold, the plaintiff, within twenty days from the date of the service of the complaint, served an amended complaint leaving out the allegations of the former complaint which stated the consideration for the note and its indorsement. *Held*, that a motion of the defendants to have the amended complaint set aside, on the ground of its insufficiency, was properly denied. (*Smith* agt. *Pfister*, 89 Hun, 147.)
89. After the service of the amended complaint the defendants procured an order extending the time to answer or demur thereto, and subsequently procured a stipulation from the plaintiff's attorney further ex-

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tending the time to answer the same. *Held*, that by procuring an order extending the time to answer or demur to the amended complaint, the defendants waived their right to deny that it was sufficient to require an answer or demurrer. (*Id.*)

40. Under the provisions of the Code of Civil Procedure a defendant may in his answer deny, upon information and belief, allegations of the complaint when he has no personal knowledge as to the facts alleged, but has information sufficient to induce him to believe that the allegations are not true. (*Wood* agt. *Raydure*, 89 Hun, 144.)

41. Power of the court to allow amendments to pleadings—when an action may be changed from contract to tort—amendment not disallowed because the claim is barred at the time the motion is made (*See Eighmie* agt. *Taylor*, 89 Hun, 886.)

42. Practice—joinder of cause of action—an action relating to different separate trusts created by the same will cannot be joined, where the beneficiaries are different and have no common interest. (*See Weeks* agt. *Cornwall*, 89 Hun, 643.)

43. Tender and payment of money into court—effect thereof, as an admission of the title of the plaintiff to the cause of action. (*See Wilson* agt. *Doran*, 89 Hun, 88.)

44. Allegations required in an action against a town for neglect to repair a bridge—when an action lies against two towns jointly. (*See Oakley* agt. *Town of Mamaroneck*, 89 Hun, 448.)

POLICE PENSION FUND.

See SUPPLEMENTARY PROCEEDINGS.
.. *Sargent* agt. *Ben* " " *ante*, 515.

POLICE RELIEF FUND.

1. The general intent of the act (*chapter 486, Laws of 1885*), was to establish a life insurance fund for the police department, and, so far as this act relates to members of the police force, it is the duty of the treasurer of the board of police commissioners to deduct a sum equal to two dollars per month from the salary of each member of the police force, whether such deduction be assented to or not (*The People ex rel. Murray* agt. *McClave*, *ante*, 8.)

2. Such deduction may be made in the case of each member or employee of the department, other than the said force, who shall desire to avail himself of the privileges and provisions of the act, and also in the case of members of the Police Mutual Aid Association, who are in good standing and who shall desire to contribute to the said fund.

Held, also, that the act in question is not unconstitutional, as depriving the members of the police force of their property without due process of law, nor as being a local act and decreasing the allowance of a public officer during the term for which he was appointed. (*Id.*)

PRACTICE.

1. In an action of partition, where issues of fact are presented by the pleadings as to part of the lands sought to be partitioned, which issues (after the plaintiff has demanded a jury trial in accordance with section 1544 of the Code) are dismissed by the defendants by default before the jury side of the court, it is error for the defendants to enter judgment dismissing the entire cause of action, including that arising from the lands admitted by the answer to be owned by the parties in common. (*Curry* agt. *Colgan*, *ante*, 26.)

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2. The proper practice after the issues are determined in such a case before the jury side, is to have the case go to special term, and after a referee's report (*see Code, secs. 1561, 1546*) as to liens, &c., on the lands admitted to be held in common, interlocutory judgment should be given (*see Code, sec. 1546*) of partition as to the latter lands, and for the defendants as to the issues. (*Id.*)

3. After the defendant's informal judgment by default had been vacated merely because of its informality, on the plaintiff's moving for such a reference as to the lands admitted to be owned in common, the defendants could not have the issues referred to the referee. (*Id.*)

See ATTACHMENT.

Moore agt. Richardson et al., ante, 288.

4. Where an affidavit for an attachment was made April 21, 1877, and the warrant issued May 2d, and final judgment entered August 21st, the Code of Remedial Justice being in effect from May 1 to May 23, 1877, and the affidavit did not conform to the Code of Remedial Justice when presented to the judge, but was in strict conformity to the Code of Procedure, which was in force when the affidavit was drawn, and also when the judgment was entered:

Held, that the effect of the statutes was that proceedings taken during said twenty-two days were valid if taken under either Code, so far as concerned an action previous to September 1, 1877. (*Denman et al. agt. McGuire, ante, 405.*)

5. It is sufficient to confer jurisdiction to grant an order of publication of summons, where the affidavit shows that efforts were made to serve it, and to ascertain defendant's place of residence, and that his residence and whereabouts were unknown. (*Id.*)

6. Where the venue was placed in Sullivan county in the summons, and it was stated in the notice that the summons was issued by the county judge of Sullivan county, and was filed with the complaint, it was sufficient notice that the complaint was filed as required by Code of Remedial Justice, section 442, where it was questioned in a collateral proceeding, although it might be irregular in a direct proceeding. (*Id.*)

7. Where plaintiff brought an action asking for the return of, and damages for the retention of, certain valuable papers, and the case was tried as one of replevin, and the jury rendered a verdict for plaintiff, awarding him the title, and thereafter plaintiff obtained an *ex parte* order for judgment, and that defendant deliver the papers, and that costs be taxed, and on the same day plaintiff entered judgment for costs and afterwards the judge struck the costs from the judgment on the ground that it was an action in replevin. On appeal from an order made on a motion of defendant to set aside the order and judgment:

Held, that the proceedings were irregular, either as an action of replevin or in equity, to compel specific performance; that the judgment, and order for judgment, should be set aside, and the case stand as it was after the verdict was rendered; and if the court desire to hear it as an equitable action, it might do so. (*Hammond agt. Morgan, ante 438.*)

8. The rights of parties to a legal action are to be determined as they were at its commencement, unless some event, happening subsequently, and affecting those already in issue, is presented by supplementary pleadings to the court, and the fact that plaintiff, after the commencement of the action, was declared a bankrupt, and that the cause of action had passed to his

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- assignee, cannot be proven on the trial where the answer was a general denial. (*Styles* agt. *Fuller*, *ante*, 464.)
9. The omission of an attorney to indorse upon a paper served or filed his post-office address or place of business, as required by rule 2 of the supreme court, is a mere irregularity, and entitles the party served either to return the paper or move to set it aside; but after receiving it without objection, he cannot safely disregard the functions which the paper is designed to perform. (*Evans* et al. agt. *Backer* et al., *ante*, 504.)
10. Section 1039 of the Code of Civil Procedure requires a notice of ten days of entry of judgment before bringing an action against the sureties on appeal; but if such notice, without the indorsement of the attorney's address, is accepted by the opposing attorney and not returned, he waives the defect, and cannot afterwards defeat such action by pleading that the required notice has not been given. (*Id.*)
11. Action against the trustees of a mutual benefit association for a breach of duty—when the plaintiff must first request a receiver of the association to bring the action—to whom money collected under an assessment made by such an association belongs. (*Fisher* agt. *Andrews*, 87 Hun, 176.)
12. Joinder of several causes of action arising out of the same transaction—when the plaintiff will not be compelled to elect upon which he will proceed—Code of Civil Procedure, sec. 481, subd. 2. (*See Blank* agt. *Hartshorn*, 87 Hun, 101.)
13. Cause of action arising from fraudulent representation—when it passes to the general assignee of the party injured thereby. (*See Moore* agt. *McKinstry*, 87 Hun, 55.)
14. Bill of particulars—when not allowed in an action for malicious prosecution. (*See Lane* agt. *Williams*, 87 Hun, 888.)
15. Redemption by a mortgagee from a sale on execution—what is a sufficient statement of the amount due—Code of Civil Procedure, sec. 1465. (*See People* ex rel. *Van Buskirk* agt. *Clark*, 87 Hun, 201.)
16. Action of foreclosure—effect of a judgment in it upon a defendant claiming a dower right prior to the lien of the mortgage—proper practice in such a case. (*See Lanier* agt. *Smith*, 87 Hun, 529.)
17. Action by an executor—when he will not be charged personally with the costs of an unsuccessful action. (*See Dean* agt. *Roseboom*, 87 Hun, 810)
18. Judgment by confession—when the statement of the facts out of which the debt arose is insufficient—Code of Civil Procedure, sec. 1274, subd. 2. (*See Citizens' Nat. Bank* agt. *Allison*, 87 Hun, 185.)
19. An appellant cannot object to an error which was advantageous to him—power of the court to sentence for a part only of the term fixed by a statute—Penal Code, sec. 351—in case of an erroneous sentence the case will be remitted for further sentence. (*See People* agt. *Bauer*, 87 Hun, 407.)
20. Action to cancel a tax sale—requirements of the statute as to certification of the assessment books must be strictly complied with—when provisions as to time of certifying will be deemed directory—when the oath of the assessors may be taken before a commissioner of deeds—right of one tenant in common to maintain an action to remove a cloud on a title to land held by several tenants in common. (*See O'Donnell* agt. *McIntyre*, 87 Hun, 55.)

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21. Supplementary proceedings—defects in the affidavit cannot be taken advantage of in collateral proceedings—power of a county judge to direct money to be paid over to the claimant—Code of Procedure, sec. 204—the board of education of Rochester is a distinct corporation, separate from the city. (*See Cooman* agt. *Board of Education of Rochester*, 87 Hun, 96.)
22. Receiver in supplementary proceedings—power of, to maintain an action to replevy goods mortgaged by the debtor—1858, chap. 814. (*See Pettibone* agt. *Drakeford*, 87 Hun, 629.)
23. Supplementary proceedings—subpoenas to witnesses should be under the hand of the referee before whom they are to testify—Code of Civil Procedure, sec. 854. (*See People ex rel Jacobs* agt. *Ball*, 87 Hun, 245.)
24. Supplementary proceedings—a witness may be compelled to attend in a county other than that of his residence—Code of Civil Procedure, sec. 2459—when an attorney cannot refuse to testify as to a transaction had with his client on the ground that it was privileged—Code of Civil Procedure, sec. 835. (*See Foster* agt. *Wilkinson*, 37 Hun, 242.)
25. Order for the examination of a party before trial—when one partner, seeking to compel a settlement of partnership accounts, may examine a copartner—the sworn denial by the party sought to be examined, of any information as to the subject of the examination—does not constitute a ground for denying the application—Code of Civil Procedure, sec. 872. (*See Davis* agt. *Stanford*, 87 Hun, 581.)
26. Examination of a party before trial—only allowed to enable the applicant to establish his own case—Code of Civil Procedure, sec. 870, &c. (*See Adams* agt. *Ossanaugh*, 87 Hun, 282.)
27. A party may be compelled to appear and be examined as to a fact denied in his pleadings—when the description of books and papers to be produced for examination is too vague and uncertain. (*See Olney* agt. *Hatcliff*, 37 Hun, 286.)
28. Costs in an action of replevin—when the defendant is not entitled to costs although he recovers back a part of the articles replevied by the plaintiff—Code of Civil Procedure, sec. 8284. (*See Kilburn* agt. *Lowe*, 87 Hun, 287.)
29. Taxation and retaxation of costs admissibility of evidence upon the hearing—mode of reviewing the taxation at special term. (*See Crooley* agt. *Cobb*, 87 Hun, 271.)
30. Sureties upon an undertaking for an attachment—they are liable for costs awarded to the defendant, although the attachment is not formally vacated—Code of Civil Procedure, sec. 640. (*See Lee* agt. *Homer*, 87 Hun, 684.)
31. Duty of the court to determine an equitable action, where a temporary injunction has been granted and an issue joined therein, although the matter in dispute has been decided by the lapse of time—when the court should determine the case simply for the purpose of settling the rights of the parties to costs. (*See Kelley* agt. *McMahon*, 87 Hun, 212.)
32. Action for trespass on lands in another state is not maintainable here—action for a slander of title—malice must be alleged—joinder of causes of action. (*See Dodge* agt. *Colby*, 87 Hun, 515.)
33. Action for money had and received—when the payment of the money to the plaintiff, or by his authority, must be alleged and

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- proved by the defendant. (*See Andrews* agt. *Moller*, 87 Hun, 480.)
34. Judgment taken on an inquest must be reviewed by motion not by appeal—a judgment in a partition suit in chancery imports a seizin of the lands by the parties. (*See Greenleaf* agt. *Brooklyn*, do. *R. R. Co.*, 87 Hun, 485.)
35. When an action may be continued in the name of the original plaintiff after he has made a general assignment—Code of Civil Procedure, sec. 449, 756. (*See Lanson* agt. *Town of Woodstock*, 87 Hun, 852.)
36. When a case must be made in in order to enable the general term to review a judgment—Code of Civil Procedure, sec. 497. (*See Delano* agt. *Harp*, 87 Hun, 275.)
37. Receiver of a corporation—power of the court to cure an omission to give notice to the attorney general by directing an order to be entered *nunc pro tunc*—property in custody of a United States court is not subject to levy—a general judgment creditor of a corporation is not entitled to notice of a motion for the appointment of a receiver thereof. (*See Morrison* agt. *Menhaden Co.*, 87 Hun, 522.)
38. Receiver of a corporation—a judgment should be entered against him as receiver, and not personally—when it may be so entered after he has been discharged as receiver. (*See Woodruff* agt. *Jewett*, 87 Hun, 205.)
39. Two actions against the same defendant upon the same cause of action—when the pendency of one such action in the United States court does not prevent the commencement of the other in the state court. (*See Utica Clothes Dryer Mfg. Co.* agt. *Otis*, 87 Hun, 801.)
40. Proceedings for the appointment of a committee of a lunatic—what allegation as to his unsoundness of mind will confer jurisdiction upon the county court—what constitutes an unsoundness of mind—right of the county court to direct that the issue of fact be tried before a jury in that court. (*See Jackson* agt. *Jackson*, 87 Hun, 306.)
41. Neglects of municipal officer to interfere to protect a taxpayer's rights—right of the latter to make the officers parties to an action brought by himself against the wrong-doers. (*See Overton* agt. *Village of Olean*, 87 Hun, 47.)
42. One principal on a bond cannot sue a surety thereon to recover for a breach of the bond by his co-principal. (*See Nans* agt. *Oakley*, 87 Hun, 495.)
43. In this action, brought to foreclose a mortgage executed by the defendant Margaret Maxwell, she appeared and answered by an attorney, Mr. G. B. White. After a judgment of foreclosure had been entered, and two days before the sale was completed, there was served upon the plaintiffs' attorney a notice of appeal from the judgment, with an undertaking to stay proceedings thereon, signed by Ed. J. Maxwell, as attorney for Margaret Maxwell. The notice was at once returned with an indorsement declining to recognize him as attorney for the said defendant, and on the day appointed the sale was completed. *Held*, that as the appeal could not be taken by the new attorney until he had been properly substituted in the place of the former attorney, the service of the notice was ineffectual to stay the proceedings and a motion to vacate the sale was properly denied. (*Shuler* agt. *Maxwell*, 88 Hun, 240.)
44. The motion to set aside the sale was made upon the further ground that the premises were not sold in

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- parcels. *Held*, that as it appeared that the appellant was not the owner of the premises, and that there was no deficiency, she could not raise the objection. (*Id.*)
45. Action to recover damages for injuries by the defendant's negligence—opinions of doctors as to the probability of the plaintiff's permanent recovery—as to the probability of the recurrence of brain troubles—objections to evidence unavailing unless the error be specifically pointed out. (*See Tozer* agt. *N. Y. C. and H. R. R. Co.*, 38 *Hun*, 100.)
46. Taking of land for railroad purposes under chapter 606 of 1875—contents of petition—power of the court to amend it—what objections to the character of the evidence cannot be first raised on appeal—duty of the commissioners as to determining the route and as to fixing the time for the completion of the railway. (*See Matter of Suburban Rapid Transit Co.*, 38 *Hun*, 553.)
47. A bill of particulars will not be allowed where the information sought for lies peculiarly within the knowledge of the defendant. (*See Fink* agt. *Jetter*, 38 *Hun*, 163.)
48. Bill of particulars in an action for libel—a party cannot be compelled to disclose his evidence—a bill of particulars cannot be required as to matters pleaded only in mitigation of damages. (*See Newell* agt. *Butler*, 38 *Hun*, 104.)
49. Indictment—variance between its allegations and the proof—an objection must first be taken at the trial—how larceny is to be charged under section 528 of the Penal Code—charge as to reasonable doubt. (*See People* agt. *Cruger*, 38 *Hun*, 500.)
50. Evidence—when a party may testify as to the value of services rendered by him to a deceased person—Code of Civil Procedure, section 829—whether or not the plaintiff has offered to refer a claim should not be submitted to the jury—right of a party to address the jury on all questions submitted to it. (*See Burrows* agt. *Butler*, 38 *Hun*, 157.)
51. Party-wall—when a covenant to pay therefor runs with the land—when a party taking subject to a covenant cannot dispute the liability of his grantor—when the parties are not entitled to a hearing before the appraisers. (*See Bedell* agt. *Kennedy*, 38 *Hun*, 510.)
52. Stay of proceedings because of the non-payment of costs—what is a waiver of the right to insist upon it. (*See Attorney-General* agt. *Continental Life Ins. Co.*, 38 *Hun*, 522.)
53. Foreign administrator—jurisdiction of the courts of this state over an action against him—amendment of a clerical error in an affidavit—Code of Civil Procedure, sec. 723. (*See Murphy* agt. *Hall*, 38 *Hun*, 528.)
54. Refusal of highway commissioners to have, what is claimed to be a public road, ascertained and recorded—an error in their decision cannot be reviewed by mandamus. (*See People ex rel. Miller* agt. *Hulse*, 38 *Hun*, 388.)
55. Action to recover assets wrongfully converted by an administrator—when it may be brought by one of the heirs-at-law. (*See Randal* agt. *Dyett*, 38 *Hun*, 347.)
56. Injunction—motion to vacate, without notice, at general term—Code of Civil Procedure, sec. 626—in what cases such a motion can be made. (*See Gere* agt. *N. Y. C. and H. R. R. Co.*, 38 *Hun*, 281.)
57. Power of the court to direct one of several persons, jointly indicted, to be tried separately—when a person is not disqualified to sit as a juror by reason of an existing opin-

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- ion as to the guilt of the accused—when evidence not alleged in the indictment is admissible in support of the charge of fraud there made—when evidence of a settlement with a third person is not admissible in favor of the party indicted—misconduct of juror—when a conviction will not be reversed therefor—duty of counsel to present objections at the time of the commission of the improper act. (*See People agt. Clark*, 88 Hun, 214.)
58. Trial of a person accused of crime—all questions of fact should be left to the jury—not more than one separate and distinct crime can be charged in an indictment—Code of Criminal Procedure, sec. 278—the objection should be taken by a demurrer—Code of Criminal Procedure, sec. 823, subd. 8—and is waived by a plea of not guilty—Id., secs. 831, 464—when an indictment is defective in failing to sufficiently identify the property taken—the objection is waived if not taken by a demurrer—so also as to a failure to set forth the value of the property taken. (*See People agt. Upton*, 88 Hun, 107.)
59. Judgment affirming a surrogate's order in special proceedings—right of a party to enter a judgment for costs. (*See Wadley agt. Davis*, 88 Hun, 186.)
60. When an entire defense cannot be stricken out as irrelevant—a pleading will not be stricken out because it does not state a good cause of action. (*See Hubbard agt. Gorham*, 88 Hun, 162.)
61. Service of summons by publication—defects in the notice attached to the summons—when they do not prevent the court from acquiring jurisdiction—Code of Civil Procedure, secs. 442, 448—purchaser at a judicial sale required to accept a title. (*See Loring agt. Binney*, 88 Hun, 152.)
62. Compulsory reference—cannot be ordered on the ground that an account must be examined, if that is not the principal issue. (*See Claflin agt. Drake*, 88 Hun, 144.)
63. Motions affecting receivers of insolvent corporations—what papers must be served upon the attorney-general under chapter 878 of 1883. (*See Greason agt. Goodwillis-Wyman Co.*, 88 Hun, 188.)
64. Action to recover a tax illegally collected by a county—when it may be recovered without first vacating the assessment—what evidence is sufficient to show a receipt of the money by the county—a claim to recover a tax illegally collected need not be first presented for audit. (*See Ross agt. Supervisors of Cayuga County*, 88 Hun, 20.)
65. Pleading—a cause of action for an absolute divorce cannot be united with one for a separation—the failure of the plaintiff to separately state his causes of action does not deprive the defendant of his right to demur. (*See Zoran agt. Zoran*, 88 Hun, 67.)
66. Certiorari—a return thereto is to be confined to matters specified in the writ—to what extent the papers used on the motion for a writ may be considered at the hearing—alteration of a highway. (*See People ex rel. Downey agt. Dains*, 88 Hun, 48.)
67. Certiorari—it cannot issue to a body which has lost control of the record to be reviewed. (*See People ex rel. L. S. and M. S. R. Co., agt. Common Council*, 88 Hun, 7.)
68. When a plaintiff should not be compelled to elect as to which of two counts he relies upon. (*See Haynes agt. Buffalo, N. Y. and P. R. R. Co.*, 88 Hun, 17.)
69. Action to restrain the enforcement of a city ordinance—when the

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- invalidity of the ordinance must have been first established in an action at law. (*See Marvin Safe Co. agt. Mayor*, 88 Hun, 146.)
70. Execution against the person of a defendant—what recitals it must contain—Code of Civil Procedure, sections 1865, 1872, 1499. (*See O'Shea agt. Kohn*, 88 Hun, 149.)
71. Order for the examination of a judgment debtor—Code of Civil Procedure, section 2496—the regularity of the issue of the execution must be shown—also a demand upon the debtor and a refusal by him to apply the property. (*See Hutton agt. Weld*, 88 Hun, 142.)
72. Surrogate's court—who may petition the court as a "creditor" for a decree directing his claim to be paid—Code of Civil Procedure, sections 2717, 2718. (*See Hall agt. Dusenbury*, 88 Hun, 125.)
73. A party entering a judgment for damages and costs, after his costs have been taxed, cannot thereafter move for a retaxation. (*See Burrows agt. Butler*, 88 Hun, 121.)
74. Increased costs in an action against a public officer—when not allowed in an action upon an indemnity bond—Code of Civil Procedure, section 8258, subdivision 1. (*See Conner agt. Keese*, 88 Hun, 124.)
75. Appointment of a guardian for an infant in a surrogate's court—no notice is required if the infant be present and consent. (*See Matter of Sebray*, 88 Hun, 218.)
76. Attachment—what facts must be stated in the papers therefor—Code of Civil Procedure, sections 635, 686. (*See Edick agt. Green*, 88 Hun, 202.)
77. Amendment to complaint—not allowed so as to change the venue thereby. (*See Rector agt. Ridgwood Ice Co.*, 88 Hun, 293.)
78. When a defect in a notice of entry of judgment is waived by an admission of its due and proper service—to review an interlocutory judgment on an appeal from a final judgment, the former must be specified in the notice of appeal—Code of Civil Procedure, sections 1801, 1816—the court cannot amend the notice by inserting such reference. (*See Patterson agt. McCunn*, 88 Hun, 581.)
79. Purchase at a foreclosure sale—the court cannot enforce it as to part, with a deduction from the price for the residue as to which the title is defective. (*See Thompson agt. Schmieder*, 88 Hun, 504.)
80. Fees of a referee appointed to take the accounts of a receiver—when not allowed until the report is made. (*See Clapp agt. Clapp*, 88 Hun, 540.)
81. Court of special sessions—restrictions upon the power of, to impose a sentence upon one convicted before it—Code of Criminal Procedure, section 717—habeas corpus—proper remedy for one imprisoned under a void judgment. (*See People ex rel. Stokes agt. Riesley*, 88 Hun, 280.)
82. Surrender of coupons upon the receipt of a worthless check—when the owner still retains his title to them—a mandamus should not issue when an ample legal remedy exists. (*See People ex rel. Port Chester Bank agt. Cromwell*, 88 Hun, 384.)
83. A commission to take testimony may issue upon a reference of a disputed claim against an estate—R. S., pt. 2, chap. 6, tit. 8, art. 2, secs. 36, 37—Code of Civil Procedure, sections 887, 888. (*See Paddock agt. Kirkham*, 88 Hun, 376.)
84. Action for libel—a demurrer will not lie, if the words can be so construed as to be libelous, although

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- also capable of an innocent meaning. (*See Patch* agt. *Tribune Association*, 88 Hun, 868.)
85. A person suing as a poor person may appeal—the privilege of so suing does not extend to such appeal—Code of Civil Procedure, section 466. (*See Moore* agt. *City of Troy*, 88 Hun, 801.)
86. Action against a trustee of a corporation for a failure to file a report—the defendant cannot serve an unverified answer—Code of Civil Procedure, sections 523, 887—such an action being *ex delicto*, the clerk cannot enter judgment on default, under section 1212 of said Code. (*See Gadsden* agt. *Woodward*, 88 Hun, 548.)
87. No order for the payment of disbursements can be made until a final judgment has been recovered. (*See Weeks* agt. *Cornwell*, 88 Hun, 571.)
88. Change of place of trial—when an action will be removed from the superior court of the city of New York, in order to change the place of trial for the convenience of witnesses. (*See Bowles* agt. *Rome, W. and O. R. R. Co.*, 88 Hun, 507.)
89. In case of a gift of a remainder where the life tenant has power to dispose of the principal, should the legatees in remainder or the executors bring the action to recover the residue of the principal. (*See Spencer* agt. *Strait*, 88 Hun, 228.)
90. Order of arrest—what facts show a fraudulent disposition of firm property, with intent to defraud creditors. (*See Hanover Vulcanite Co.* agt. *Nathanson*, 88 Hun, 488.)
91. Deposit in a savings bank in trust for another—the beneficiary may recover it from the executor of the trustee, if the executor has drawn it out—such action lies against the executor individually. (*See Anderson* agt. *Thomson*, 88 Hun, 804.)
92. Right to issue a precept to collect the costs of a motion—Code of Civil Procedure, sec. 779—when the order is served by mail the party has twenty days within which to pay them—costs of a motion cannot be set-off against other motion costs, after the latter have been assigned by the party. (*See Wellman* agt. *Prost*, 88 Hun, 889.)
93. A tenant in common may join his wife as a co-plaintiff in an action for partition—Code of Civil Procedure, sec. 1638. (*See Foster* agt. *Foster*, 88 Hun, 866.)
94. Challenge to a juror for bias—to what subject the bias must relate—Code of Criminal Procedure, sec. 876—peremptory challenge—right of comment by the court. (*See People* agt. *Carpenter*, 88 Hun, 490.)
95. Motion for a new trial on the ground of a change in the decisions of the court of appeals on the question involved—when the motion will be barred by laches—motion for a new trial on exceptions—within what time it must be made—costs allowed on its denial. (*See Forstman* agt. *Schulting*, 88 Hun, 482.)
96. Defect of parties, when waived, unless the objection is taken by answer—evidence—what admissible to show the good faith of a vendee when the sale is attacked as fraudulent—what facts do not show a sale to be fraudulent. (*See Moore* agt. *Gordon*, 88 Hun, 467.)
97. Right of a stockholder to bring an action against a corporation and its officers misappropriating its funds—right of the corporation to appeal from a judgment against the plaintiff—contract by the agent of a corporation—which he cannot appropriate benefits intended for the corporation. (*See Sheridan* agt. *Sheridan Electric Light Co.*, 88 Hun, 396.)

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98. Judgment creditor's action—when the debtor may attack the judgment as obtained through fraud. (*See Richardson* agt. *Trimble*, 88 *Hun*, 409.)
99. Power of court to order a reference on a motion to continue an injunction—it may compel the personal appearance of the affiants—may prescribe upon what notice the hearing should be had—may prohibit an application for the examination of witness without the state by a commission. (*See Stubbs* agt. *Ripley*, 89 *Hun*, 620.)
100. The court has not power to compel a husband, in an action for divorce, to pay for the printing of papers on an appeal by his wife—when the court will relieve an appellant from printing the case. (*See Fagan* agt. *Fagan*, 89 *Hun*, 531.)
101. Power of the court to allow amendments to pleadings—when an action may be changed from contract to tort—amendment not disallowed because the claim is barred at the time the motion is made. (*See Highmie* agt. *Taylor*, 89 *Hun*, 866.)
102. Power of the court to order issues to be settled although more than ten days have elapsed since they have been joined—General Rules Supreme Court No. 31. (*See Apel* agt. *Connor*, 89 *Hun*, 482.)
103. Right to serve an amended complaint—an extension of time is a waiver of the right to object that a complaint is not sufficient to require an answer or demurrer. (*See Smith* agt. *Pfister*, 89 *Hun*, 147.)
104. What instructions to a jury as to their duty to agree is allowable. (*See Cranston* agt. *N. Y. C. and H. R. R. Co.*, 89 *Hun*, 308.)
105. Action to restrain the use of a trade-mark—will not lie if the plaintiff is chargeable with a false representation in using it—when an action for an injunction will not be retained as one for damages. (*See New York Card Co.* agt. *Union Card Co.*, 89 *Hun*, 611.)
106. Action to restrain the prosecution of another action in the same court—only allowed where full and complete justice cannot be obtained in the first action. (*See Hayward* agt. *Hood*, 89 *Hun*, 596.)
107. Libel—action to restrain the publication of the name of the plaintiff as a delinquent debtor—what must be shown in order to obtain a temporary injunction. (*See Greene* agt. *U. S. Dealers' Pro. Association*, 89 *Hun*, 800.)
108. Joinder of causes of action—an action relating to different separate trusts created by the same will cannot be joined where the beneficiaries are different and have no common interest. (*See Weeks* agt. *Cornwall*, 89 *Hun*, 648.)
109. Modification of a judgment by the general term so as to send the case back to a referee to consider one particular subject—a motion to confirm the report should be made at special term and not at the general term. (*See Gautier* agt. *Douglas Mfg. Co.*, 89 *Hun*, 642.)
110. Stay of proceedings on appeal—when an allowance of a counterclaim in behalf of a defendant will be treated as a judgment recovered by him against the plaintiff. (*See New York, L. E. and W. R. R. Co.* agt. *Carhart*, 89 *Hun*, 516.)
111. Referee—he is disqualified by reason of his having already, in an action for divorce, found one of the parties guilty of adultery. (*See Matter of Bliss*, 89 *Hun*, 594.)
112. Failure of a referee to deliver or file his report within sixty days—a delay of the successful party to take

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- it up, when induced by representations as to a settlement made by the unsuccessful party, does not justify the vacating of an order of reference. (*See Dwyer agt. Hoffman, 39 Hun, 860.*)
113. Settlement of a case when a referee's findings of fact are to be reviewed as being against the weight of evidence—as having no evidence to support them. (*See Spence agt. Chambers, 39 Hun, 193.*)
114. Costs—traveling fees of a witness—when allowed from the place of service of the subpoena—copy of stenographer's minutes—when the amount paid for it will not be allowed as a disbursement. (*See Pfandler Barm Extracting Co. agt. Pfandler, 39 Hun, 191.*)
115. Additional allowances not allowed to the plaintiff where the controversy has been whether his recovery should be reduced by the amount of a counter-claim, and such counter-claim has been established by the defendant. (*See N. Y., L. E. and W. R. R. Co. agt. Carhart, 39 Hun, 363.*)
116. Surrogate—power of, to inquire as to the validity, as against creditors, of a transfer from the deceased to his executor. (*See Matter of Kellogg, 39 Hun, 275.*)
117. Sale of the real estate of a decedent to pay his debts—petition—what allegations it must contain—what are sufficient. (*See Matter of German Bank, 39 Hun, 181.*)
118. Attachment—the affidavit may be made by the plaintiff's attorney—facts are presumed to be within his personal knowledge—when a deposition of a defendant in another action may be used instead of his affidavit—when the affidavits are sufficient. (*See James agt. Richardson, 39 Hun, 399.*)
119. Attachment—void because of a failure to serve the summons within thirty days, as required by section 227 of the Code of Procedure. (*See Cossitt agt. Winchell, 39 Hun, 489.*)
120. Attachment—in what actions it may be issued—Code of Civil Procedure, sec. 625—when affidavits made in another action may be used on a motion for an attachment. (*See Whitney agt. Hirsch, 39 Hun, 325.*)
121. Recorder of the city of Cohoes, he cannot accept money in lieu of bail—1880, chap. 456, sec. 30—he is personally liable for money so received. (*See Eagan agt. Stevens, 39 Hun, 311.*)
122. When a husband cannot avail himself of a judgment recovered by his wife against the same defendant for the same accident. (*See Groth agt. Washburn, 39 Hun, 324.*)
123. Judgment creditor's action—lien acquired by the plaintiff first commencing it—priority of it over that acquired by other creditors subsequently becoming parties. (*See Ulatfin agt. Gordon, 39 Hun, 54.*)
124. Draft received by a bank for collection—when the sender is entitled to the amount collected in preference to the general creditors—a receiver will be directed to make payment on a summary application. (*See People agt. Bank of Dansville, 39 Hun, 187.*)
125. Negligence—when the question as to the negligence of the master, in failing to provide for the safety of his employee, should be left to the jury. (*See Williams agt. Delaware, Lack. and Western R. R. Co., 39 Hun, 430.*)
126. Action of ejectment—power of the court to set aside a second judgment—Code of Civil Procedure, sec. 1525—the discretion exercised by the court below is reviewable on

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- appeal. (*See Keeler* agt. *Dennis*, 89 *Hun*, 18.)
127. When the payment of an assessment is deemed to have been made under coercion—right of an owner to recover it after vacating the assessment—statute of limitations—when time will be extended by a statutory provision requiring a certain time to elapse after presentation of the claim before an action will lie. (*See Brehm* agt. *Mayor*, 89 *Hun*, 588.)
128. Taxation of shares in national banks—neither the bank nor its receiver can apply for a reduction in the assessment—the assessment can only be reviewed by certiorari—the party aggrieved must apply to the assessors for relief before applying to the court. (*People* agt. *Wall St. Bank*, 89 *Hun*, 525.)
129. When the court may direct a verdict—when interest follows a recovery as matter of legal right (*See Mayor* agt. *Sands*, 89 *Hun*, 519.)
130. Distribution of a surplus fund arising on foreclosure—what claims may be considered by the referee—notice must be given to all persons interested in the fund. (*See Kingsland* agt. *Chetwood*, 89 *Hun*, 602.)
131. To review a motion for nonsuit the case must show a ruling and an exception thereto—gift of a promissory note—the owner may testify as to his intent in delivering it. (*See Pritchard* agt. *Hirt*, 89 *Hun*, 378.)
132. Order of arrest—when a third order will not be set aside as procured for the purpose of vexing and harassing the defendant. (*See Citizens' National Bank* agt. *Vorhis*, 89 *Hun*, 24.)
133. Criminal Procedure—when objections not raised in the lower court cannot be taken on appeal—Code of Criminal Procedure, sec. 751. (*See People ex rel. Baker* agt. *Beatty*, 89 *Hun*, 476.)
134. Bill of particulars—may be ordered in an action on an account stated. (*See Wells* agt. *Van Aken*, 89 *Hun*, 815.)
135. Admissibility of a judgment to show a peaceful entry—when a recovery cannot be had under a claim hostile to that alleged in the complaint. (*See Bradt* agt. *Church*, 89 *Hun*, 262.)
136. Mistake in the description of land intended to be conveyed—when the equitable rights of a party may be asserted in an action of ejectment—when it is not necessary to first have the deed reformed. (*See Glacken* agt. *Brown*, 89 *Hun*, 294.)
137. Statute of limitation—an action to reform a deed must be brought within ten years—when a party cannot recover land conveyed without first having his deed reformed. (*See Hoyt* agt. *Putnam*, 89 *Hun*, 402.)
138. When counsel should not be allowed to read from a text-book to the jury. (*See Lesser* agt. *Perkins*, 89 *Hun*, 841.)
139. Application for the cancellation of a tax sale—the comptroller's decision cannot be reviewed by mandamus. (*See People ex rel. Equitable L. Ass. Soc.* agt. *Chapin*, 89 *Hun*, 230.)
140. Proper practice in paying money into court. (*See Wilson* agt. *Doran*, 89 *Hun*, 88.)
141. The rule of the supreme court (rule 2), requiring all papers served or filed to be indorsed or subscribed with the name of the attorney and his office address or place of business, does not require the office address to be stated more than once on the same paper. (*Falker* agt.

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N. Y., W. S., &c., R. Co., 100 *N. Y.*, 86.)

142. Where, therefore, a copy of judgment was indorsed with the names of the plaintiff's attorneys and their office address, and below this was also indorsed a notice of judgment signed by said attorneys without giving their office address, *held*, that there was a sufficient compliance with the rule, and the notice was effectual to limit the time for appeal. (*Id.*)
143. Where numerous exceptions appear in a case, most of which are untenable, but some one of them may be sustained by reason or authority, the attention of the court should be specifically called thereto; it is not sufficient to group them all together in the points of counsel under a single allegation of error, without stating a ground to support any one. (*Nelson* agt. *Village of Canisteo*, 100 *N. Y.*, 89.)
144. An appeal from a judgment entered on a verdict must be determined solely upon exceptions taken on the trial. (*Third Ave. R. R. Co.* agt. *Ebling*, 100 *N. Y.*, 98.)
145. An exception can be taken only to a ruling by the trial court upon a question of law. (*Id.*)
146. Where there is no exception to a ruling of the court as to the sufficiency of the evidence to establish a fact in issue, and the defeated party desires to move for a new trial, he must do so in the first instance before the trial court or at special term. *Code of Civil Pro.*, sec. 999, 1102) (*Id.*)
147. Not having done this, no question affecting the merits or the sufficiency of the evidence to support the verdict may be raised at general term. (*Id.*)
148. An exception to the admission of evidence may only be taken when it is received against the parties' objection. (*Id.*)
149. The provisions of the Code of Civil Procedure regulating the method by which a review of errors on a trial before a surrogate may be secured, and providing for a loss of a right of review unless such methods are regularly pursued, furnish and limit the only remedy against such errors. (*In re Hawley*, 100 *N. Y.*, 206.)
150. Where a summary proceedings, instituted to remove a tenant holding under a lease executed by a firm, are founded upon an affidavit in which one of the members of the firm is described as the lessor, he must be regarded as representing the actual lessor, and a judgment therein against the lessee, is to be considered as a judgment in favor of the firm. (*Nemelly* agt. *Naylor*, 100 *N. Y.*, 562.)
151. The informality does not invalidate the proceedings and judgment, and so is no objection to the judgment when collaterally brought in question; it may only be taken advantage of on objections taken in the proceedings. (*Id.*)
152. Resort may be had to evidence given on a trial showing facts not found, for the purpose of sustaining the decision of a referee, but not to reverse it where there was no request and refusal to find. (*Everson* agt. *City of Syracuse*, 100 *N. Y.*, 577.)
153. A defendant may be required to serve a bill of particulars as to matter set forth in his answer, which is effectual only as a defense, as well as to matter set up as a counter-claim. (*Koisy* agt. *Surgent*, 100 *N. Y.*, 602.)
154. Where the matter is left uncertain, by reason of general averments, it is for the court below to determine whether further infor-

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mation required by plaintiff shall be given by a more specific answer or by a bill of particulars, and its determination is not reviewable here. (*Id.*)

PRIVILEGED COMMUNICATIONS.

1. Where a physician is selected by the public prosecutor, and sent by him to a prisoner after a crime has been committed, and she accepts his services in a professional character, disclosures made by her to him are privileged communications, and this rule applies to all actions, civil or criminal. (*People v. Murphy, ante, 469.*)

2. The opinion of such physician as to whether an abortion has been committed, founded partly on such statements, is also inadmissible. (*Id.*)

3. Although the prisoner was a party to the crime (abortion) and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gesta*, were not admissible. (*Id.*)

PROMISSORY NOTE.

1. A promissory note given and taken by plaintiffs, for a patent right, which fact was not indicated upon the face of the note as required by statute (*Laws of 1877, chap. 65*), which statute makes such taking a misdemeanor, cannot be enforced by plaintiffs and in their hands at least is absolutely void. (*Spring agt. Quance, ante, 65.*)

2. Whether plaintiffs can recover the consideration for which the note was given? (*Quance.*) (*Id.*)

3. In action against an indorser of a

promissory note where the indorsement was subsequent to the inception of the note, the complaint must allege a consideration for the indorsement. (*Myers et al. agt. Crim et al., ante, 194.*)

4. This is necessary, as a consideration must be proved, the indorsement being subsequent to the inception of the note and not alleged to have been done in pursuance of any arrangement made at the time the note was made. (*Id.*)

See PLEADING.

Berrigan agt. Oviatt, ante, 199.

QUO WARRANTO.

1. The complaint in this action alleged that the defendant had been elected to the office of town clerk of the town of Hillsdale, and that he had entered upon the discharge of the duties of his office, but that he was not eligible to the office because he had not been an inhabitant of the town for the year next preceding the election; that by reason of his ineligibility a vacancy in the office of town clerk existed, to fill which the relator had been lawfully elected. *Held*, that although the people need not have alleged the defendant's election and his inability to hold the office, but might have simply alleged that he had intruded into the office unlawfully, and have called upon him to show by what authority he claimed to hold it, yet, as these allegations were in fact made, the defendant by not denying them admitted them to be true and thereby established his own incapacity to hold the office. (*People ex rel. Cornell agt. Knox, 88 Hun, 286.*)

2. That as it was admitted by the defendant that he was not entitled to hold the office, he could not appeal from a judgment declaring the relator elected thereto, as no one but

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the people could question the right of the latter to hold the office. (*Id.*)

RAILROADS.

1. The Utica and Schenectady Railroad Company took a fee to the land taken by proceedings—in *in-vitum*—under its charter, granted in 1838 (*Laws of 1838, ch. 294*), although the charter limits the duration of the company to fifty years. (*Beal* agt. *N. Y. C. and H. R. R. Co.*, *ante*, 820.)
2. Even assuming the plaintiff never to have been deprived of the fee in the premises in suit and still to be such owner, yet such ownership is subject to public use by defendants for railroad purposes, which use has not ceased or determined, and therefore she is not entitled to the possession of the property and cannot maintain this action (*Heard* agt. *The City of Brooklyn*, 60 *N. Y.*, 242, and *String* agt. *The City of Brooklyn*, distinguished; *Terry* agt. *The N. Y. C. and H. R. R. Co.*, 67 *Hov.*, 439, commented on). (*Id.*)

REFEREE.

1. In an action brought by an assignee to set aside a chattel mortgage given by a judgment debtor to defendants as security for \$26,000 of acceptances made by defendants for the mortgagors—said chattel mortgage covering a large quantity of lumber, machinery, &c.; the assignee seeking to compel defendants to account to him for the property taken by them under said mortgage, a reference being had, the costs of the action are in the discretion of the referee, and after the exercise of such discretion it is not within the province or power of the special term to overhaul and overturn his conclusions. (*Couch* agt. *Millard et al.*, *ante*, 22.)
2. His decision as to costs cannot be disturbed except by an appellate court having power to review the case upon its merits. (*Id.*)
3. In proceedings before a referee supplementary to execution, a subpoena should be issued by and under the hand of the referee, pursuant to section 854 of the Code of Civil Procedure. (*Knowles* agt. *De Lazare*, *ante*, 35.)
4. Upon the application of the relator for a writ of *habeas corpus* to obtain the custody of his son, an infant under the age of fourteen years, who had been committed to the custody of the mother, under articles of separation, entered into by his parents, the proceedings were sent to a referee, who had already, in an action for divorce, brought by the husband, the relator, against his wife, made a report finding the wife guilty of adultery upon a number of occasions. *Held*, that it was error to deny a motion made by the wife to change the referee. (*Matter of Bliss*, 39 *Hun.*, 594.)
5. Within sixty days from the time of the submission of this case to the referee, and on February 24, 1885, he notified the parties that he had made a report in favor of the plaintiff and held the same ready for delivery. To accommodate the defendant, and substantially at his request and by reason of propositions looking towards a settlement of the litigation made by him, the plaintiff failed to take up the report within the sixty days. *Held*, that a motion by the defendant to vacate and set aside the order of reference because of the non-delivery or filing of the referee's report within the time fixed by the statute was properly denied. (*Dwyer* agt. *Hoffman*, 39 *Hun.*, 360.)
6. Power of the court to order a reference on a motion to continue an injunction—it may compel the per-

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sonal appearance of the affiants—may prescribe upon what notice the hearing should be had—may prohibit an application for the examination of witness without the state by a commission. (*See Stubbs agt. Ripley*, 39 Hun, 620.)

7. Modification of a judgment by the general term so as to send the case back to a referee to consider one particular subject—a motion to confirm the report should be made at special term, and not at the general term. (*See Gautier agt. Douglas Mfg. Co*, 39 Hun, 642.)

8. Distribution of a surplus fund arising on foreclosure—what claims may be considered by the referee—notice must be given to all persons interested in the fund. (*See Kingsland agt. Chetwood*, 39 Hun, 602.)

REFERENCE.

1. Under section 1011 of the Code of Civil Procedure, as amended by chapter 542 of the Laws of 1879, it is imperative on the court to appoint another referee where a new trial is granted in an action tried before a referee named in the stipulation to refer, "unless the stipulation expressly provides otherwise." (*Carter agt. Wallace*, ante, 350.)
2. In an action on an attorney's account, where the allegations of the complaint allege a general retainer and the performance of various services in criminal proceedings, *quo warranto*, and other matters, and the moving affidavits on motion for reference set forth more plainly that these services were rendered in many and different proceedings and cases, and upon separate, distinct and several requests, and there is no denial of any portion of the affidavit, except defendant alleges in his affidavit that plaintiffs were acting only about matters connected with a certain election.

Held. It is a proper case to refer, and does not come within the line of decisions that hold where services in only one action are involved that ought not to be a reference. (*Bean agt. Bank of Elmira*, 19 W. D., 206, distinguished). (*Hale et al. agt. Swinburne*, ante, 472.)

3. Actions to set aside fraudulent conveyances, transfers, releases and settlements should be tried by the court. (*Rochester agt. The Mayor, Alderman, &c., of New York et al.*, ante, 527.)

4. Under section 1013 whether to refer or refuse the reference is addressed to the discretion of the court. It is obviously the purpose and theory of the law that equity actions are to be tried by the court. (*Id.*)

5. Even in actions involving the examination of a long account, references are ordered, not as a matter of right or of favor to the parties, but for the convenience of the court, and the court cannot, for its own convenience in such cases, order a reference when there are difficult questions of law involved. (*Id.*)

6. The plaintiff having recovered a judgment against a limited corporation for goods sold and delivered to it, and issued an execution thereon which had been returned unsatisfied, brought this action against a stockholder to enforce the liability alleged to have been incurred by him by reason of the failure of the stockholders to pay in the amount of the capital stock subscribed for. The answer was a general denial. *Held*, that as until the plaintiff should establish the defendant's liability for the debts of the company, proof as to the sale of the goods to the company itself would be unnecessary; the action was not one in which a compulsory reference could be ordered upon the ground that it involved

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the examination of a long account. (*Olafin* agt. *Drake*, 88 *Hun*, 144.)

7. Where a referee has been appointed to take the proofs and evidence touching the compensation to be made to a receiver of a corporation, the court will not make an order for the payment of any sum to the referee on account of his fees until his report upon the accounting has been made. (*Olapp* agt. *Olapp*, 88 *Hun*, 540.)
8. Liability of a party, discontinuing an action, for the costs and expenses incurred—right of a person rendering services, under the employment of a referee, to maintain an action against the plaintiff discontinuing the action, for the value of the services so rendered. (*See Meserole* agt. *Furman*, 88 *Hun*, 855.)
9. A commission to take testimony may issue upon a reference of a disputed claim against an estate—R. S., pt. 2, chap. 6, tit. 3, art. 2, secs. 86, 87—Code of Civil Procedure, secs. 887, 888. (*See Paddock* agt. *Kirkham*, 88 *Hun*, 876.)
10. Resort may be had to evidence given on a trial showing facts not found, for the purpose of sustaining the decision of a referee, but not to reverse it where there was no request or refusal to find. (*Emerson* agt. *City of Syracuse*, 100 *N. Y.*, 577.)

REMEDIES.

1. That an action upon contract is pending in the United States court, is no bar to another action in a state court to enforce the same cause of action. (*Oneida County Bank* agt. *Horrendon*, *ante*, 446.)

REMOVAL OF CAUSE.

1. A foreign citizen or subject re-

mains such until naturalization is complete, according to the laws of congress, although, by the state laws he might vote or hold office after the mere declaration of intention to become a citizen. (*Maloy* agt. *Duden et al.*, *ante*, 153.)

2. In a case otherwise within the removal act of 1875, it is the right of the defendant to remove the cause at any time "before the trial thereof." This means, before any step is taken in the actual trial of the cause, such as the empaneling of the jury, &c. (*Id.*)
3. To bar the right to removal, "it must appear that the trial had actually begun, and was in progress in the orderly course of proceedings when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone." (*Id.*)
4. Where, as in this case, the right to try the case at all was challenged by the defendants as soon as it was called on the day calendar and, on hearing these objections, all further proceedings in the cause were suspended until that preliminary question was determined, and in order to determine it the cause was sent into another part of the court. *Held*, that the trial had not actually begun, and that the cause was not even in a condition to be tried, and the right of removal still remained. (*Id.*)

REPLEVIN.

1. In a replevin action brought by a vendor against an attaching officer of a fraudulent vendee, it is competent to show the fact that, shortly after the purchase, the vendee made a general assignment for the benefit of creditors. The recitals contained

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in it are not, however, competent evidence (*Green agt. Rosa, ante, 29.*)

3. In such a case, the schedule and inventory made by the assignor, subsequent to the assignment and pursuant to the statute, are not admissible evidence. The inventory would not tend, as against the officer, to establish the assignor's liabilities. (*Id.*)

See ACTION.

Hammond agt. Morgan, ante, 438.

SERVICE OF PUBLICATION.

1. Under sections 438, 439 and 440 of the Code of Civil Procedure, in an action for divorce, for the purpose of obtaining an order to serve summons by publication, it is necessary for the plaintiff to show that he has been or will be unable, with due diligence, to make personal service of the summons. (*Bingham agt. Bingham, ante, 166.*)
2. Where the affidavit of the deputy sheriff only showed, of his own knowledge, that he went to the house where defendant resided with her mother and found it locked, the rest of his affidavit being only report or hearsay or conclusions:
Held, not sufficient to warrant an order for publication of the summons.
Held, also, that an appearance and answer by the *guardian ad litem*, was not a waiver of any defects in the service of the summons. (*Id.*)

See SUMMONS.

Loring agt. Binney, ante, 130.
Denman agt. McGuire, ante, 405.

SHERIFF.

See IMPRISONED DEBTOR.

Matter of Irving, Jr., do., ante, 236.

SPECIFIC PERFORMANCE.

See ACTION.

Hammond agt. Morgan, ante, 438.

STATUTE OF LIMITATIONS.

1. Except as limited by section 390 of the Code of Civil Procedure, that section extends to non-resident debtors the protection of the Statute of Limitations in all cases where it has run according to the laws of the debtor's residence. (*Howe agt. Welch, ante, 435.*)
2. In determining this question the foreign law, as interpreted by the local courts of the state whose statute is invoked, must prevail. In other words, under our Code foreign debtors are allowed to bring with them the protection which their home government gives them while there—nothing more. (*Id.*)
3. The courts of this state will not construe foreign statutes, but must accept the interpretation the local courts of the particular state place upon them. Each state is the best interpreter of its local laws. (*Id.*)

STOCK.

See DAMAGES.

Wright agt. Bank of Metropolis, ante, 204.

SUMMARY PROCEEDINGS.

See WRIT OF PROHIBITION.

People ex rel. Evans agt. Latson, ante, 331.

SUMMONS.

1. Where, in proceedings for the service of the summons in an action upon parties without the state by publication, the requirements of the statute were complied with except

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that when a copy of the summons and complaint was mailed to each non-resident named in the order, notice accompanying the copy summons so mailed, instead of being the notice that was published with the summons, stating that the summons was served by publication, pursuant to an order of the judge who made it, was a notice that the summons was served without the state of New York, pursuant to the order of the judge, and except that the notice which was published failed to be directed to the defendants alone who were to be served with the summons by publication:

Held, that the failure to comply with the requirements of the Code in these respects, did not so far invalidate the service as to deprive the court of jurisdiction over these absent defendants. (*Loring agt. Binney, ante, 120.*)

2. Although a summons in an action has not been served in a due and orderly manner, yet, if defendant was sufficiently advised of the proceeding to protect his rights, that does not warrant the vacating of a preceding attachment of which the defendant does not assert he was ignorant. (*Fulton County Chemical Works agt. Jochen, ante, 163.*)

3. Under sections 438, 439 and 440 of the Code of Civil Procedure, in an action for divorce, for the purpose of obtaining an order to serve summons by publication, it is necessary for the plaintiff to show that he has been or will be unable, with due diligence, to make personal service of the summons. (*Bingham agt. Bingham, ante, 166.*)

4. Where the affidavit of the deputy sheriff only showed, of his own knowledge, that he went to the house where defendant resided with her mother and found it locked, the rest of his affidavit being only report or hearsay or conclusions:

Held, not sufficient to warrant an

order for publication of the summons.

Held, also, that an appearance and answer by the *guardian ad litem*, was not a waiver of any defects in the service of the summons. (*Id.*)

5. It is sufficient to confer jurisdiction to grant an order of publication of summons, where the affidavit shows that efforts were made to serve it, and to ascertain defendant's place of residence, and that his residence and whereabouts were unknown. (*Denman agt. McGuire, ante, 405.*)

6. Where the venue was placed in Sullivan county in the summons, and it was stated in the notice that the summons was issued by the county judge of Sullivan county, and was filed with the complaint, it was sufficient notice that the complaint was filed as required by Code of Remedial Justice, section 442, where it was questioned in a collateral proceeding, although it might be irregular in a direct proceeding. (*Id.*)

SUPERVISORS.

1. Where an account or bill is presented to a board of supervisors which is not sufficiently full in details or sufficiently verified, it should be returned to the claimant, to the end that he may make such amendments and corrections as are suitable and proper for the purpose of complying with the statutes. (*People ex rel. Brown agt. Board of Supervisors of Herkimer Co., ante 241.*)
2. Where, as in this case, the board might have required a more detailed statement of the expenditures than was given in the account as presented, yet where instead of rejecting the claim as they might have done, they proceeded to act upon it and investigate it and to a

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certain extent allowed it, their action will not be interfered with by mandamus. (*Id.*)

3. The discretion of the board as to auditing and allowing accounts ought not to be taken away or interfered with or absolutely directed by the court. (*Id.*)

4. Where a board of supervisors has acted upon a claim and passed upon its merits, the action is conclusive upon the claimant and succeeding boards. It is binding and effectual to shut off a suit for a portion of or a balance of a claim thus presented and acted upon. The allowance of an account by the board is a judicial act, and is in the nature of a judgment against the county. (*Id.*)

5. If a party is not satisfied with an audit of his claim, he should review it or take such remedy as remains to him before accepting the award. By an acceptance of the audit and the order issued in accordance with it, he adopts and ratifies the proceedings had in regard thereto. They thus become mutual and operative upon the creditor and debtor. (*Id.*)

6. Whether in this case a mandamus is a proper remedy if a wrong has been done, *quære*. (*Id.*)

7. Where the board of supervisors of Ulster county audited a bill for costs and expenses of an appeal to the state assessors, by the supervisors of the city of Kingston, from the equalization of valuations against that city, although requested by the latter to wait until they could be heard on the matter; and the city of Kingston obtained a writ of *certiorari* to review the proceedings, which was dismissed, and on the defendants failing to levy the tax necessary to pay the bills, an order for a *mandamus* was granted at special term to compel them to do so, and affirmed at general term.

On appeal from order at general term of affirmance:

Held, that the order granting the *mandamus* was proper and should be affirmed. (*People ex rel. Supervisors of Ulster County agt. City of Kingston*, ante, 452.)

8. Where an appeal from equalization of valuations is sustained, the costs must be assessed to the wards, towns and cities in the county other than the appellant, but if it be not sustained, then they must be borne by the town, ward or city appealing. (*Id.*)

9. The legislature has the power to constitute the board of supervisors a board to audit the expenses against the city, and the latter did not come within the statute prohibiting a judge from sitting in a case in which he is a party or is interested. (*Id.*)

10. Where the city supervisors did not make a demand for a hearing until just before the time for the adjournment, they having knowledge of the matter for some time before, no legal right was invaded by the denial of the application for delay. (*Id.*)

11. The board of supervisors had an interest to enforce the collection against the city, and although it did not directly authorize its attorney to procure a *mandamus*, its general retainer "in all matters in litigation," and the appointment of the committee, conferred ample authority to uphold this proceeding. (*Id.*)

12. The omission of the city, while laying other taxes, to include these items, was equivalent to a refusal to pay it after the proceedings taken. (*Id.*)

SUPPLEMENTARY PROCEEDINGS.

1. In proceedings before a referee

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supplementary to execution, a subpoena should be issued by and under the hand of the referee, pursuant to section 854 of the Code of Civil Procedure. (*Knowles* agt. *De Lanza*, ante, 85.)

2. Where the affidavit upon which an order for a debtor to appear and be examined in supplementary proceedings was entitled in the supreme court, giving the title to the action and stating that "judgment was rendered and perfected in this action," &c.:

Held, that this is in substance a statement that judgment was recovered in the supreme court. (*Webster* agt. *Sawons*, ante, 820.)

3. The affidavit stated that the said judgment was docketed and the judgment roll filed in the office of the clerk of the county of New York on the 14th day of January, 1886, and a transcript filed and duly docketed in the office of the clerk of Oneida county on the 15th day of January, 1886, and that an execution against the property of the defendants was on that 15th day of January, 1886, duly issued on said judgment and delivered to the sheriff of Oneida county, where the defendants reside.

Held, that upon this state of the case it will be presumed as between the parties, that the execution was issued after the filing of the transcript.

Held, further, that there being a sufficient allegation of the recovery of the judgment in the supreme court, then the allegation that the execution was duly issued on said judgment is in substance an allegation that the execution was issued out of a court of record. (*Id.*)

4. Moneys received by the widow of a policeman from the police pension or insurance fund, cannot be reached by a judgment creditor on supplementary proceedings, instituted either before or after the

money reaches her hands. (*Sargent* agt. *Bennett*, ante, 515.)

5. The police pension or insurance fund is in the nature of a trust, expressly authorized by statute for the benefit of widows and orphans, and as the funds proceed from persons other than the judgment-debtor, and are intended for the support of the beneficiaries, they cannot be directed by means of this proceeding and turned over to creditors. (*Id.*)

SURROGATE.

1. Upon an application for an appointment of a guardian of an infant, the surrogate has authority to direct that access to the infant shall be allowed by the guardian when appointed, to such persons as the surrogate may designate. (*Matter of Derickson Minors*, ante, 31.)

TAXATION.

See SUPERVISORS

People ex rel. Supervisors of Ulster County agt. *City of Kingston*, ante, 452.

TRESPASS.

1. A property owner has the absolute right to prevent, by injunction, unauthorized trespassing upon his lands. (*Post et al.* agt. *Phelan et al.*, ante, 138.)

2. The owner of cattle leased them, together with her farm, for a term of years, for a money rent. The cattle, when in the possession of the lessee, committed trespass upon a neighbor's lands. Action was brought for the damage done by the trespass against the owner of the cattle:

Held, that the owner was not liable for the damage done by the cattle while trespassing; that the

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owner, having lost the control and possession of the cattle, and not being able to gain possession or obtain control of the cattle, is not responsible for damage caused by them (*Van Slyck* agt. *Snell*, 6 *Lans.*, 299, followed and *distinguished*). (*Atwater* agt. *Lowe*, *ante*, 139.)

TRUSTS.

1. In an action brought by plaintiff as executor of his mother, M. N. De P., against the defendant, as an individual and as executor of his father, F. De P., the second husband of plaintiff's mother, to recover various sums of money alleged to have been received by F. De P., during his wife's life-time, for and on account of his wife, and which moneys, or the rights thereto, were acquired by Mrs. De P. prior to the married woman acts of 1848 and subsequent years, and, at the trial, the check book of testator was introduced in evidence, the stubs of which contained the following entries, viz.: Under date of February 5, 1884, "Mrs. F. De Peyster, Mrs. F. G. Foster, Mr. John Hone, proceeds from sale of their portion of P. L. Co. bond and stock as per mem. on file, and including checks 2,474 and 2,475, \$16,733.33, note; Mrs. De P., \$5,511.11; Mrs. F., \$5,511.11; Mrs. Hone, \$5,511.11; check, 2,474, \$50; do, 2,475, \$150." Also entry made April 20, 1884, in check book, on the deposit side, as follows, viz.: "Mrs. De Peyster's legacy from Hone estate, \$6,000; interest from November 22 last, as per receipt in Hone's receipt book, \$172.66; total, \$6,172.66."

Held, that these entries indicate a declaration of trust. (*Hone* agt. *De Peyster*, *ante*, 423.)

2. The division by the testator of the money arising from the bond and stock of the Peru Iron Company, by which the amount was divided between the parties from whose interest it arose, and the widow, was,

in effect, credited with her share, is a plain indication of the intention of the testator to hold such proceeds, not for the benefit of himself, but for the benefit of his widow. It was, substantially, placing himself in the situation and relation of a trustee as to these moneys, for the benefit of his wife:

Held, further, that the plaintiff, as executor of the estate of the widow, was entitled to recover those moneys, as funds held in trust for the testatrix by her husband. (*DAVIS*, P. J., dissenting.) (*Id.*)

TRUSTEES.

1. Where executors are also trustees, they are entitled to commissions in both capacities, where the will contemplates a severance of duties, and a point of time at which those of the executor would be ended and those of the trustees begin, but where a portion of the trust estates consists of real property, the commissions should not be computed upon the value of the real estate subject to the trust, but only upon sums of money, or other equivalent, received and paid out. (*Wagstaff* agt. *Louwerre*, 28 *Barb.*, 209, overruled.) (*Phenix* agt. *Livingston*, *ante*, 400.)

UNDERTAKING.

1. Where an order of arrest is obtained in an action where the cause of action and cause of arrest are identical, and the order of arrest is vacated on motion, and the plaintiff on the trial withdraws by stipulation the allegation of fraud from the complaint.

Held, that the order vacating the order of arrest became the final decision that the plaintiff in said action was not entitled to the order of arrest, and an action was maintainable upon the undertaking for damages sustained by reason of

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the arrest. (*Rothnell agt. Paine et al., ante, 187.*)

2. Rule 5 of the General Rules of Practice which provides, that an attorney and counselor shall not be surety on any undertaking or bond, does not apply to a person whose name still appears on the roll of attorneys, but who abandoned the practice of the law many years ago to engage in another occupation, in which he still continues. (*Stringham agt. Stewart, ante, 214.*)

VOLUNTARY PAYMENT.

1. Upon the application of plaintiff, proceedings for the foreclosure of a mortgage were stayed, the plaintiff, although not a party to the mortgage, but liable on the bond, undertaking to pay the same by a certain day. Before the day named he procured a person to take an assignment of the mortgage. The defendants, the attorneys of the mortgagees, agreed to have the mortgage assigned, the plaintiff to pay the costs and expenses of the foreclosure suit. The defendants included in such costs and expenses an item of two and one-half per cent, amounting to \$187.50, in the nature of an allowance, which plaintiff disputed, and it was reduced by defendants to \$100, to which they claimed to be entitled, which latter sum was paid by the plaintiff, he, however, at the time protesting that it was illegally and wrongfully exacted. In an action brought to recover back the sum so paid:

Held, that it could not be recovered back, as paid under duress. (*Bliss agt. Wallis, ante, 325.*)

WILL.

1. In construing a will whose provisions are fully set forth, *infra*:
Held, that the testator's widow

was given a life estate simply, with power to receive and enjoy only the interest and income of the principal, which, at her death, was to go to the testator's children. (*Matter of Fernbacher, deceased, ante, 81.*)

2. A testamentary provision for masses for the benefit of the testator's soul is valid, and should be upheld. (*Holland agt. Smyth, ante, 106.*)
3. Where the will directed the property to be sold, but gave no directions as to who should exercise the power of sale, such power being one authorized by the Revised Statutes, it would be the duty of this court to designate a trustee to execute the will, provided that it could be seen, from the will itself, that the execution of the power, without such designation, would utterly fail. (*Loring agt. Binney, ante, 143.*)
4. But where, by the terms of the will, the realty is converted into personalty, or a sale is necessary, as its proceeds to be realized from a sale, and not the land itself, is given to the heirs, there is an implied power in the executor to sell such realty for the purpose of distribution. (*Id.*)

See MUTUAL BENEFIT ASSOCIATION.
Kaiser agt. Kaiser, ante, 104.

WITNESS.

See COSTS.
Pfandler Bawn Bunging Apparatus Company agt. Pfandler et al., ante, 253.

1. A plaintiff cannot, under the provisions of article 1, title 3, chapter 9 of the Code of Civil Procedure, compel his adversary to appear and be examined before the trial, when the object of the examination is to compel him to disclose the evidence

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by which he intends to establish his defense; such an examination must be confined to facts which tend to establish the applicant's cause of action or defense. Where, in an action brought to foreclose a mortgage for non-payment of interest, the execution of the mortgage is admitted and the action is defended on the grounds of payment of the interest and of usury, the plaintiff cannot compel the defendant to appear and be examined before trial, when it is apparent that the purpose of the examination is to ascertain the evidence by which the defendant intends to support his defense. (*Adams agt. Cavanaugh*, 87 Hun, 282.)

2. In an action in which the plaintiff seeks to hold the defendants liable as partners for goods sold to them by him, the fact that the defendants deny in their answer the alleged partnership furnishes no ground for denying an application by the plaintiff to have them compelled to appear and be examined before trial. (*Olney agt. Hatcliff*, 87 Hun, 286.)
3. An order requiring defendants to produce books and papers, if any there are touching the business relations of defendants, as between themselves and third parties, which refer to or would cover or include the purchase of the goods alleged to have been sold, is too vague and uncertain. (*Id.*)
4. In this action, brought to recover the possession of a farm, the defendant claimed that one Stuart, under whom the plaintiff claimed, had held the title to the farm in trust for the defendant to secure the payment of a certain sum of money, and that the said sum had been paid to Stuart. Stuart was a member of the firm of Freeland, Hoffman & Co., of New York, to which firm the defendant was indebted, as well as to Stuart, individually. Upon the trial evidence

was given tending to show that in November, 1842, the defendant deposited a package of gold in an express office at Rochester, containing an amount of money less than the amount of his indebtedness to the firm. Testimony was given from which it might be inferred that the gold was sent to the firm, and that it had received it and sent the defendant its voucher therefor. It also appeared that the package was opened at the place of business of the firm by Stuart himself. The defendant was allowed, against the plaintiff's objection and exception, to testify that the package was addressed to Stuart, individually, and not to the firm, Stuart having since died. *Held*, that it was error to admit this testimony. (*Stuart agt. Patterson*, 87 Hun, 113.)

5. That if it was admitted to show that the package was sent to Stuart, and not to the firm, it related to a personal transaction or communication, and was inadmissible under section 839 of the Code of Civil Procedure. That if it was admitted simply as a part of the description of the package delivered to the carrier, it was immaterial and irrelevant. (*Id.*)
6. Where the testimony of the surviving party will tend directly, or by proper inference, to prove a communication made, or a transaction had, between the witness and the deceased, under such circumstances as that it can be seen that the deceased if living, might give testimony directly contradictory to that of the witness, or tending to repel the inference to be drawn therefrom, the testimony is inadmissible, provided the case, in all other respects, is within the statutes. (*Id.*)
7. This action was brought upon a promissory note, purporting to be made by the defendant to the order of one Leach, by whom it was in.

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- dorsed and transferred to the plaintiff. The defense was that the signature of the defendant was forged. Upon the trial the defendant, having been sworn in his own behalf, was shown the note and asked, "Is the signature to this paper, marked 'A' (the note in suit), your signature?" An objection interposed by the plaintiff that the question was inadmissible, under section 829 of the Code of Civil Procedure, as calling for a personal transaction with the payee, who was then dead, was sustained by the court. *Held*, that it erred in so doing. (*Saratoga County Bank* agt. *Leach*, 87 Hun, 886.)
8. This action was brought to recover for services rendered by the plaintiff, as attorney and agent, to the defendant's intestate. Upon the trial a certified copy of a power of attorney, from the deceased to the plaintiff, was received in evidence, together with other proof tending to show that the plaintiff had been employed by the deceased. The plaintiff was then allowed, against the defendant's objection and exception, to testify as to services rendered by him under the employment, and as to their value. *Held*, error; that such testimony was excluded under section 829 of the Code of Civil Procedure. That it was also error to allow the plaintiff to testify that his claim had not been paid. (*Lerche* agt. *Brasher*, 87 Hun, 885.)
9. Action to recover damages for injuries occasioned by the defendant's negligence—opinions of doctors as to the probability of the plaintiff's permanent recovery—as to the probability of the recurrence of brain troubles—objections to evidence unavailing unless the error be specifically pointed out. (*See Tver* agt. *N. Y. C. and H. R. R. Co.*, 88 Hun, 100.)
10. The credibility of witnesses called by the plaintiff who are in his employment is to be carefully scrutinized, and the weight and effect of their evidence should be submitted to the jury. (*See Michigan Carbon Works* agt. *Schad*, 88 Hun, 71)
11. Criminal trial—what evidence is inadmissible on cross-examination—evidence cannot be given to sustain the character of a witness until it has been attacked. (*See People* agt. *Van Houten*, 88 Hun, 168.)
12. Perjury—when a witness testifying under an honest mistake is not guilty of that offense—Penal Code, sec. 96. (*See People* agt. *Dishler*, 88 Hun, 175.)
13. Evidence—a physician cannot testify as to information acquired while attending a patient—no one but the patient can waive the privilege—Code of Civil Procedure, secs. 884, 886. (*Kenihan* agt. *Dennin*, 88 Hun, 270.)
14. When a party may testify as to the value of services rendered by him to a deceased person. (*See Burrows* agt. *Butler*, 88 Hun, 157.)
15. Evidence—when inadmissible as calling for a personal communication with a deceased person—Code of Civil Procedure, sec. 829. (*See Campbell* agt. *Hubbard*, 88 Hun, 806.)
16. Witness—he cannot be asked whether he was ever indicted (*See Kober* agt. *Miller*, 88 Hun, 184.)

WRIT OF PROHIBITION.

1. Where a petition in summary proceedings presents such a case as the officer can consider, a writ of prohibition will not lie. (*People ex rel. Evans* agt. *Lotson*, ante, 381.)
2. Where L. presented a petition to a justice of the peace, praying for the removal of a tenant from certain premises under the provisions

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of the Code of Civil Procedure, concerning summary proceedings to recover possession of real estate, and the justice issued a warrant which was served upon the tenant, and on the return day he appeared and filed an answer denying each and every *material* allegation, and also set up new matter, going to the question of title; the petitioner demurred to the answer that it contained no defense, which demurrer was sustained, and a final order granted awarding possession to pe-

tititioner, and directing the issuing of a warrant, which was issued and delivered to the sheriff:

Held, that a writ of prohibition would not lie.

Held, further, that the question in the case really is, whether the justice erred in sustaining the demurrer of the petitioner to the answer of the relator. That question cannot be determined by writ of prohibition. It can be by appeal, and, in a proper case, there is a remedy by injunction. (*Id.*) ~

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E. G. A. A.

ERRATA.


In *Threep Grain Cleaner Company* agt. *Smith* (ante, 308), in fourth line from top of page, the word "Pinchey" should read "*Binchey*," and on page 308, fifteenth line from top, the word "resting" should read "*setting*."

In *Jacquin* agt. *Jacquin*, vol. 2 *Hew. [N. S.]*, page 81, the last paragraph of head note should read as follows:

This is adverse to *dicta* contained in opinion of BRACH, J., in *Zimmerman* agt. *Richard and Dodge*, (58 *Hew.*, 11); and *Graf et al.* agt. *Kinney* (1 *Hew. [N. S.]*, 89). But see opinion of WARNBROOK, J., in *Fairlee* agt. *Bloomington* (67 *Hew.*, 203), which is in accord with opinion in this case.

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